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No. 90-——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAUREL SAND & GRAVEL, INC.,
Petitioner

v.

CSX TRANSPORTATION, INC. and
MARYLAND MIDLAND RAILWAY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the summary judgment standards announced for antitrust cases by this Court in *Monsanto*[1] and *Matsushita*[2] were intended to supersede the Court's long-standing instructions (a) that evidence of conspiracy is not to be evaluated in a tightly compartmentalized fashion, (b) that separate agreements for each act in furtherance of a conspiracy need not be shown, and (c) that otherwise-lawful acts become unlawful when taken pursuant to an unlawful conspiracy.

2. Whether, contrary to the decision of the Court of Appeals for the Ninth Circuit now before this Court in *Chevron Corp. v. Arizona*, No. 90-1552 (petition for certiorari filed April 8, 1991),[3] this Court's *Monsanto* and *Matsushita* decisions authorize the district courts to grant summary judgment against an antitrust plaintiff relying on circumstantial evidence whenever the plaintiff does not prove to the summary-judgment court's satisfaction that the evidence excludes any possibility of innocent conduct.

3. Whether, contrary to the holdings of the Courts of Appeals for the Third and Fifth Circuits, the rule announced by this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), denying antitrust standing under Section 4 of the Clayton Act to indirect purchasers suing for treble damages in "overcharge" cases, applies also to claims for injunctive relief under Clayton Act Section 16.

4. Whether an "indirect purchaser" that is "the focus of [an] alleged conspiracy" to exclude competitors from the market is barred from suit by *Illinois Brick*, even though its claimed damages are not "overcharges."

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[1] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

[2] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[3] *In re Coordinated Preirial Proceedings In Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990).

LIST OF PARTIES

The parties to the proceedings below were petitioner Laurel Sand & Gravel, Inc., respondent CSX Transportation, Inc., and respondent Maryland Midland Railway, Inc. ("MMR"). MMR was a plaintiff in the district court and an appellant in the court of appeals but is not petitioning for certiorari; it is named as a respondent in this Court pursuant to Rule 12.4.[4]

[4] Petitioner Laurel Sand & Gravel, Inc. has no parent companies or subsidiaries to be listed pursuant to Rule 29.1.

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MARYLAND MIDLAND RAILWAY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Laurel Sand & Gravel, Inc. respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on January 30, 1991.

OPINIONS BELOW

The opinion of the court of appeals is reported at 924 F.2d 539, and is reprinted in the appendix hereto ("Pet. App.") at 1a, *infra*.

The Opinion and Order of the United States District Court for the District of Maryland granting respondent CSX' motion for summary judgment are reported at 704

F. Supp. 1309, and are reprinted at Pet. App. 14a, *infra*. The unreported Memorandum and Order of the district court denying petitioner's motion for reconsideration under Fed. R. Civ. P. 59(e) are reprinted at Pet. App. 44a, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. A timely petition for rehearing was denied on February 27, 1991 (Pet. App. 48a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, and Rule 56(c) of the Federal Rules of Civil Procedure are set out at Pet. App. 49a-51a, *infra*.

STATEMENT OF THE CASE

Introduction

This is a civil antitrust action brought by petitioner Laurel Sand & Gravel, Inc. ("LSG") against respondent CSX Transportation, Inc., alleging that CSX violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by acting in concert with a competitor of LSG (Millville Quarry, Inc.) to restrain competition in the Baltimore-Washington market for aggregate construction materials (sand, gravel, and crushed stone).[5] Both damages and injunctive relief were sought.[6] The gravamen of the alleged agreement was to use CSX' position as the only rail carrier into that market to deny to Millville's competitors economically practicable rail transportation of crushed stone from dis-

[5] The district court's jurisdiction was conferred by 28 U.S.C. § 1337(a).

[6] A. 13, 25-26 (Complaint); A. 37, 49 (Amended Complaint). "A." refers to the Joint Appendix in the court of appeals.

tant quarries, reserving such service exclusively to Millville and thereby excluding competitors—primarily LSG—from the market.[7]

The district court granted summary judgment for CSX. (Pet. App. 25a-36a, *infra*)[8] On appeal, the court of appeals affirmed, in an opinion holding (1) that petitioner had failed to produce evidence justifying a trial, both as to whether there was an unlawful agreement and as to whether it caused petitioner's exclusion, and (2) that in any event petitioner, the excluded competitor, lacked antitrust standing to complain. (Pet. App. 7a-10a, *infra*)[9]

The Parties and Products Involved

Petitioner LSG distributes construction aggregate materials, including sand and gravel, in the Baltimore-Washington market. It is the largest producer of such materials in the Baltimore-Washington corridor, and the second-largest in the State of Maryland. Since 1982, however, sand and gravel reserves in and near the Baltimore-Washington market have been severely depleted. (A. 491-94) Because crushed stone is a close substitute

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[7] Petitioner's co-plaintiff in the district court was respondent Maryland Midland Railway, Inc. ("MMR"), a "short line" railroad that serves LSG's stone quarry in Woodsboro, Md. MMR would have participated in the rail movement of LSG's stone to the latter's CSX-served distribution site (Annapolis Junction, also known as Ft. Meade Junction, Md.) if CSX had not refused to provide it and LSG with economically practicable joint-line service. MMR also claimed (independently of the joint § 1 claim) that CSX had monopolized the rail transportation of aggregate materials into the Baltimore-Washington market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

[8] Summary judgment was also granted to CSX on MMR's § 2 claim. (Pet. App. 37a-43a, *infra*)

[9] The court of appeals also affirmed the district court's grant of summary judgment against respondent MMR on its separate § 2 claim. (Pet. App. 10a-13a, *infra*) MMR does not seek review of this affirmance and is not a petitioner in this Court.

for sand and gravel in many construction uses (A. 173), the demand for crushed stone in the Baltimore-Washington market has increased each year since 1983 (A. 489). Geologically, however, crushed stone is not found throughout the area, but only in the Piedmont region lying between the "fall line"[10] and the Blue Ridge mountain range west and north of Frederick, Maryland. (A. 172-73) Because crushed stone is so heavy, and trucking operations so expensive, trucks cannot (at least absent a backhaul) effectively serve customers more than 35 miles from the quarry. (*Ibid.*)[11] Thus, economical rail transportation into the market is essential for more distant stone producers to compete.

Starting as early as 1982, petitioner LSG has sought to secure additional reserves of aggregate materials in order to meet consumer demand in the Baltimore-Washington market. In June 1986, LSG obtained an option to purchase a stone quarry in Woodsboro, Maryland (the Barrick Quarry), some 60 miles from the Baltimore-Washington corridor.[12] Woodsboro is located on the Walkersville branch of the Maryland Midland Railway, a short line that connects with a CSX secondary rail line at Emory Grove, Maryland (north of Baltimore). From Emory Grove, the CSX line runs to Baltimore, where it in turn connects with the CSX main line through the Baltimore-Washington corridor. (A. 175-76, 183-84)[13] It was LSG's intention to produce crushed

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[10] The fall line is the geologic division between the Atlantic coastal plain and the Piedmont; it runs along the Baltimore-Washington corridor through the centers of those cities. (A. 172-73)

[11] *See also* A. 220-21, 252-53.

[12] The purchase contract was actually entered into by the individual who wholly owns LSG, Kingdon Gould, Jr., through the vehicle of a separate wholly-owned corporation (Gould Holding Co., Inc.). (A. 175-76)

[13] A sketch-map of the locations involved (not drawn to scale) is found in the opinion of the District Court. (Pet. App. 17a, *infra*)

stone at Barrick and transport it by rail to LSG's existing distribution site at Annapolis Junction (near Fort Meade), Maryland, which is on the CSX main line at the midpoint of the Baltimore-Washington corridor.

Respondent CSX is a diversified transportation company that operates one of the seven largest railroad systems in the United States. (A. 435)[14] In addition to the above-mentioned main line along the Baltimore-Washington corridor and the line to Emory Grove, CSX' rail lines run from stone quarrying sites throughout Maryland, West Virginia, and Pennsylvania into the Baltimore-Washington market. (A. 179)

CSX in its railroad operations is a common carrier; until enactment of the Staggers Rail Act of 1980, 49 U.S.C. § 10101a *et seq.*, its routes, rates, and practices were closely regulated by the Interstate Commerce Commission. The Staggers Act substantially deregulated the railroad industry, including CSX. Among other things, the former regime of ICC rate regulation was largely replaced by a system of privately negotiated "rail transportation contracts" between railroads and shippers. Congress' purpose was to allow carriers a "new freedom . . . to market rail transportation more effectively." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 100 (1980). Thus, under Section 208(a) of the Staggers Rail Act, 49 U.S.C. § 10713, rail transportation contracts for the most part are treated "as they are elsewhere in the economy." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 58 (1980).

As Congress expressly recognized, of course, this means that "the Federal antitrust laws apply" (H.R. Rep. 96-1430, *supra*, at 101). "If anticompetitive behavior is alleged, . . . the antitrust laws are the appropriate and

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[14] The CSX system includes the former Baltimore & Ohio (B&O), Chesapeake & Ohio (C&O), Western Maryland (WM), Louisville & Nashville (L&N), Atlantic Coast Line (ACL), Seaboard Air Line (SAL), and many smaller formerly independent railroads too numerous to mention.

only remedy available" (H.R. Rep. No. 96-1035, *supra*, at 58).

The Co-Conspirator

Millville Quarry, Inc., the other party to the conspiracy alleged by petitioner,[15] is a major producer and distributor of construction aggregates in the Baltimore-Washington market and is one of petitioner's primary competitors. Millville controls the Millville Quarry near Charles Town, West Virginia, as well as aggregate distribution sites at Bladensburg, Annapolis Junction (where petitioner LSG also has its distribution facility), Westport, and Fulton Station (Baltimore) in the Baltimore-Washington corridor.

Since the early 1980's Millville has shipped crushed stone by rail via CSX from its West Virginia quarry to the Baltimore-Washington corridor. Since April 1985, these shipments have been pursuant to a rail transportation contract. (A. 180, 456-64) The distance over CSX lines from Millville's West Virginia quarry to Annapolis Junction (midway on the corridor) is more than three times the distance to Annapolis Junction from Emory Grove, Maryland, where CSX interchanges with the Maryland Midland short line serving petitioner LSG's Barrick Quarry. (A. 182)[16]

The Conspiracy Alleged By Petitioner

Petitioner LSG's efforts to obtain rail transportation from CSX for stone from its Barrick Quarry, on terms competitive with those afforded Millville for its much more distant stone, have been fruitless. As evidence that

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[15] Millville is controlled by two individuals, Larry Campbell and Robert Jenkins, who also control a number of other corporate and unincorporated business entities. (A. 41-42) As used herein, "Millville" refers to these individuals and entities as well as to Millville Quarry, Inc. itself.

[16] *See* the map at Pet. App. 17a, *infra*. The court of appeals erroneously thought that Millville's quarry was "closer to Annapolis Junction than LSG's" (Pet. App. 4a, *infra*).

the consequent exclusion of LSG from the market has resulted from a conspiracy between CSX and Millville directed precisely to that end, petitioner showed the following:

(a) The entrance to both LSG's and Millville's Annapolis Junction distribution facility is served by CSX "wye" tracks (tracks in the shape of a "Y") that join the main CSX line. (A. 175) In March 1984, CSX—knowing that LSG had previously requested access over the "wye" tracks (*ibid.*)—entered into an exclusive lease with LSG's competitor Millville providing that CSX "shall not have the right to use so much of the said ["wye"] tracks to serve directly other industries without the written consent of Lessee [Millville]" (A. 537). The only "other industry" on the "wye" tracks was LSG's Annapolis Junction facility. (A. 696) At the time, Millville had no property that the "wye" tracks could serve; it was not until a year later that CSX conveyed a small amount of property within the "wye" (as well as title to the "wye" tracks themselves) to Millville. (A. 539-45) The exclusive-use provision was contrary to CSX' standard track lease provision "that the use of the trackage is not exclusive" (A. 375), and was entered despite the fact that the "wye" tracks could have served both LSG and any distribution site that Millville might later obtain there (A. 525-29, 531).[17]

(b) In 1985, another Millville competitor, Rockville Crushed Stone, reached agreement with CSX negotiators on rail rates, only to have the rates increased at the last

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[17] The court of appeals thought that the exclusive-use lease and subsequent sale of the "wye" track "only blocked [LSG's access] *at that particular point*" (Pet. App. 6a, *infra*, emphasis by the court). This overlooks CSX' own acknowledgement of LSG's "lack of access with sale of junction trackage to Millville Quarries" (A. 579), as well as the fact that only six months earlier CSX had persuaded the State of Maryland to relinquish its preferential right to acquire trackage adjoining the wye, ostensibly "so as not to impede rail service to the Kingdon Gould [LSG] Property" (A. 549).

minute by a CSX official. A contemporaneous CSX document contains the handwritten statement that there must be "absolutely no mention of Millville Quarry—i.e., reason for our raising rate" (A. 559).[18]

(c) In 1986, Baltimore Asphalt Paving Company ("BAPCO") sought to purchase from CSX its Fulton Station facility in Baltimore, which BAPCO had leased and used in its business for more than 50 years. (A. 602-03) BAPCO planned to ship crushed stone to the facility for its own use (*ibid.*) and to sell in competition with Millville (A. 606). Millville promptly let CSX know how "very upset" it was "about . . . the offer made to BABCO [sic]" (A. 244), and announced it wished to purchase Fulton Station itself (A. 604-05). CSX' account manager, R.J. Frost, questioned Millville's motive for seeking a second distribution site less than five miles from its existing Westport operation, and urged that "if CSX doesn't have a legal obligation [to go through with a deal with BAPCO], we certainly have a moral one" (A. 606-07). Commenting on CSX' apparent inclination to sell the property to Millville, Frost questioned why, "[i]f the property is up for bid, shouldn't all players have the same opportunity?" (A. 607) CSX sought no other bids, however. (A. 175, 225-26)[19] Eight days after Frost's

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[18] Without explanation, or even acknowledgement of this contemporaneous admission, the court of appeals stated that it was "unclear . . . whether the increase was sought to protect Millville or to simply get a better price" (Pet. App. 6a, *infra*).

[19] Martin Marietta Aggregates did get eleventh-hour word of the impending sale to Millville and tried to put together a crushed-stone traffic proposal in support of BAPCO, but, as Martin Marietta later complained, CSX withheld vital information and thereby denied Martin Marietta "an equal opportunity to participate" (A. 573). Millville's principal later admitted that Millville was "determined to fight off competition from Martin Marietta and certainly had no intention of allowing M.M. to get a foot hold in Baltimore" (A. 577).

The court of appeals' only comment was that "Millville did, however, make the highest bid" (Pet. App. 6a, *infra*).

internal protest, Millville demanded "that Mr. Robert Frost have nothing to do with our account" (A. 609). Shortly thereafter, Frost was removed from Millville matters. (A. 238-39) Within a few weeks—"without even a discussion" with BAPCO (A. 603)—CSX agreed to sell Fulton Station to Millville. (A. 613) The site remains unused, as Frost anticipated. (A. 290-91)

(d) In June 1986, LSG obtained its option on the Barrick Quarry, located on a branch of the Maryland Midland Railway. (A. 174-76, 181)[20] LSG officials met with CSX to discuss a contract rate for moving the stone from the quarry via MMR to its interchange point with CSX at Emory Grove, and thence to Annapolis Junction via CSX. (A. 579, 661) LSG requested a response by mid-August, because, as CSX recognized, LSG's Barrick option was of limited duration. (A. 176-77, 579-80) Despite repeated requests (A. 661-64), no response was forthcoming until November 6, 1986 (A. 664), after LSG's option would originally have expired (A. 176-77).[21] CSX then proposed an "exit" rate that it knew would be unacceptable. (A. 177, 198-99, 294-96, 359-61)[22] The rate proposed was substantially higher than that given by

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[20] *See supra* note 12.

[21] LSG made an additional payment to extend the Barrick option when the CSX rail rate was not forthcoming. (A. 178)

[22] After this litigation commenced, CSX offered a lower rate, which the court of appeals took to be "one cent above CSX's variable cost" (Pet. App. 6a, *infra*). As the court acknowledged, however (*see* Pet. App. 6a, 7a *infra*), this was hotly disputed by petitioner. Thus, for example, the underlying cost documents for this proposal (which bear the handwritten caption, "PRIVATE AND CONFIDENTIAL—PREPARED IN ANTICIPATION OF LITIGATION") show that CSX was still trying to keep LSG's rate as high as possible. (A. 637, 1076) For example, the cost documents indicate that "CSX's higher per diem aggregates cars" costs were to be used. (A. 637) The cost per car assigned to LSG was $615 per month (*ibid.*), whereas the cost for the less expensive and available "Algoma" cars was only $330 per month (A. 653).

CSX to Millville, *even though Millville's haul was more than three times as long as LSG's.* (A. 182)[23] Again, concerns about Millville played a major role in CSX' internal deliberations.[24]

(e) In a last-ditch effort to overcome CSX' obvious stonewalling, MMR finally requested "trackage rights," which would enable MMR to move trains over CSX' line. (A. 686) Two months later (but only three or four business days after a remarkable memorandum from the President of CSX), the request was denied. (A. 695)[25]

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[23] *See* the map at Pet. App. 17a, *infra*. As noted above, the court erroneously thought that Millville's quarry was "closer to Annapolis Junction than LSG's." *See supra* note 16.

[24] Contemporaneous notes by MMR's President from an August 1986 meeting with CSX list "Millville Q competition" as a "CSX problem" (A. 595). CSX documents and testimony similarly speak of "deterioration of our relationship with Millville" (A. 244-45) and "impact on Millville" (A. 596).

[25] The memorandum resulted from a meeting between the CSX President (J.W. Snow) and Millville's Campbell, solicited by Campbell, which came about as follows: While CSX was considering MMR's "trackage rights" request, it was simultaneously negotiating with Millville on a rail transportation contract covering crushed stone to be obtained by Millville from a quarry in Hanover, Pennsylvania, further up the CSX secondary line to Baltimore from Emory Grove (the interchange point with MMR). *See* the map at Pet. App. 17a, *infra*. According to an internal CSX briefing memorandum prepared for Snow, the parties were at odds on the issue of "alternate customers being offered competitive rail rates on the coattails of Mr. Campbell's investments" (A. 625). The CSX negotiators had proposed that CSX "not offe[r] *lower* transportation numbers under like and similar conditions" (*ibid.*) (emphasis in original), but Campbell was not satisfied and cancelled all discussions until further notice (A. 626), insisting on a meeting directly with Snow (A. 625).

On December 29, 1986, shortly after his meeting with Campbell, Snow wrote to Richard Sanborn, the superior of the CSX official considering MMR's "trackage rights" request, "[f]ollowing up on our conversation regarding Larry Campbell, . . . to remind you of his interest in being given a senior point of contact in the company who would give him the 'sense of trust and security' that he feels

The original LSG/MMR request for a simple joint rate quotation, as CSX recognized, was "merely proposal and [MMR] will consider *any* proposal including [MMR] supply equipment" (A. 596, emphasis added). Thus, according to CSX itself, the burden was on "CSX to progress and offer counter proposal" (*ibid.*). In six months of ongoing negotiations, however, CSX never offered the most efficient alternative—a joint rate for what its personnel would later describe as a "run-through interchange," in which "the entire train is interchanged from one carrier to another," locomotives and all, and manned by the second carrier's crews. (A. 211-14) CSX' own personnel testified without contradiction that CSX offered run-through interchanges with other railroads (*ibid.*), and there was uncontradicted expert testimony that "a run-through agreement would be a satisfactory substitute" for trackage rights, and one not subject to any legitimate business objections that might be raised against the latter (A. 320-21).[26]

(f) Even following CSX' refusal of "trackage rights," CSX and Millville continued their concerted efforts to limit access to Millville's market. A contract entered into

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he needs to proceed with his planned investments in stone transfer points on the B&O." Snow's memorandum stated that Campbell "has a certain degree of apprehension about the current situation and the fact that he is planning to make very large investments on the B&O," and suggested that Sanborn respond to Campbell's desire for "a chance to sit down with someone at a higher level and establish the sort of rapport and sense of understanding and trust that he feels is called for" (A. 619). A few days later, Sanborn's subordinate denied MMR's "trackage rights" request; the outcome of the Hanover contract negotiations is described *infra*.

[26] The court of appeals apparently overlooked the availability of run-through interchange arrangements and thought "trackage rights the only economically viable option" (Pet. App. 6a, *infra*). CSX, plainly hoping to bury the issue rather than confront it, has throughout this litigation carefully avoided any attempt to deny the appropriateness or feasibility of joint "run-through interchange" service for LSG.

by CSX and Millville in April 1987 for hauling stone to be obtained by Millville from a quarry in Hanover, Pennsylvania, gave Millville the right to cancel if it could show that CSX' pricing actions damaged Millville in the marketplace. (A. 622)[27] Similarly, CSX' 1987 National Account Plan for Millville recited one of its "Primary Strategies" as being to "Protect CMH [a Millville tradename] from late competitors endeavoring to enter this market by not providing the *same* economies, unless *greater* volumes are tendered" (A. 511, emphasis added).[28]

The District Court's Decision

The district court concluded that this evidence did not entitle petitioner LSG to go to trial, and granted CSX' Rule 56(c) motion for summary judgment. The court conceded that LSG had made "showings . . . of agreements between CSX and Millville Quarry, Inc. that well could be found at trial to be illegal restraints of trade" (Pet. App. 16a, *infra*). And it acknowledged LSG's contention that "CSX has engaged in a *series* of exclusionary acts in concert with Millville to deny access to Laurel Sand & Gravel and others, and that the refusal of trackage rights is but one in that series" (Pet. App. 28a, *infra*, emphasis in original).

But because the court thought that LSG did not "claim damages for any of these transactions" except the ulti-

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[27] The court of appeals mischaracterized this agreement as "a 'most favored nations clause'" applicable only "if CSX granted a competitor of Millville a lower rail rate" (Pet. App. 5a, *infra*). CSX had offered such a "most favored nations" clause, but this was rejected by Millville; the final contract, agreed to following the meeting between Millville's Campbell and the President of CSX (*supra* note 25) gave Millville the broader protection described above.

[28] The same National Account Plan repeatedly characterized the Millville situation as "delicate" for CSX (A. 511) and "political" (A. 503), even "extremely political" (A. 511).

mate refusal of trackage rights (Pet. App. 25a, *infra*), it viewed LSG's claims as necessarily "based solely on the refusal of trackage rights" (Pet. App. 27a, *infra*).[29] And as to that refusal, it declared, "[w]hile each other act cited by plaintiffs may have been suggestive of that conspiracy [to deny access], the denial of trackage rights was not in furtherance of the alleged conspiracy" (Pet. App. 28a, *infra*).

The only factual justification offered by the district court in support of this determination was its assertion that "nowhere in the record is it shown that there was any indication that CSX considered Millville's position on trackage rights, and Millville was not aware of either the request or the refusal" (Pet. App. 28a-29a, *infra*). The court discussed neither the meeting between Millville and CSX President Snow, nor Snow's subsequent memorandum to the CSX official (Sanborn) whose subordinate actually denied the request. (*See supra* note 25) It did not discuss the uncontradicted evidence that CSX knew petitioner LSG would "consider *any* proposal" (A. 596, emphasis added), and that a joint run-through interchange arrangement would have been both practicable and consistent with CSX' business policies and actual practices (A. 211-14, 320-21).[30]

Nor did the district court make any attempt to explain why it deemed the purported unilateral nature of the "trackage rights" refusal a more persuasive inference than the opposing inference, argued by petitioner LSG, that the acknowledged CSX/Millville conspiracy was, in the

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[29] *See also* Pet. App. 16a ("the denial of trackage rights . . . forms the sole basis of plaintiffs' claims"), 19a ("plaintiffs have sued solely because CSX refused to rent to MMR the tracks"), *infra*.

[30] Indeed, nowhere in the district court's opinion is there any reference whatsoever to run-through interchanges or joint rates therefor.

court's word, "overarching" (Pet. App. 31a, *infra*). All the court said was that "[a]n explanation of CSX's decision to deny trackage rights does not *require* the assumption of an agreement with Millville" (Pet. App. 32a, *infra*, emphasis added).[31] This in turn meant, according to the court, that LSG's evidence "fail[ed] to exclude the possibility" of independent action by CSX. (Pet. App. 31a-32a, *infra*) Citing this Court's decisions in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the district court held that CSX therefore was entitled to summary judgment. (Pet. App. 30a-33a, *infra*)

The district court gave as an "additional reason" for "dismissing the claims of Laurel Sand & Gravel against CSX" its belief that LSG lacked antitrust standing. (Pet. App. 36a, *infra*) Because in its view LSG's claim was simply "that it has been damaged by the refusal of CSX to grant trackage rights" to MMR (Pet. App. 33a-34a, *infra*), LSG was deemed a mere "indirect purchaser" within the meaning of this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and thus without standing to claim damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. Without mentioning LSG's parallel claim for injunctive relief under Clayton Act Section 16, 15 U.S.C. § 26, the court granted CSX' summary judgment motion in its entirety. (Pet. App. 42a-43a, *infra*)

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[31] In the same vein, the court offered nothing specific to support its repeated conclusory assertions that "[t]here is no factual or rational reason to believe that agreements to favor Millville as a competitor in the aggregates market motivated CSX's refusal to rent track" (Pet. App. 28a, *infra*), that "when it came . . . to giving up its track, the issue was no longer Millville" (Pet. App. 29a, *infra*), and that "[a]ll the evidence points to the conclusion that *this* decision was unilaterally made" (*ibid.*, emphasis in original).

The Opinion of the Court of Appeals

The court of appeals affirmed. Like the district court, it focused entirely upon CSX' ultimate act of refusing to grant MMR "trackage rights." The ruling of the district court, it stated, was "that there was no probative evidence that the refusal of defendant CSX to grant trackage rights to MMR over its rails was prompted by conspiracy" (Pet. App. 2a, *infra*). The evidence of prior contracts and agreements between CSX and Millville relied upon by petitioner to LSG to show the conspiracy was held not "to exclude the possibility that the denial of trackage rights was a unilateral decision by CSX prompted by legitimate business concerns" (Pet. App. 8a-9a, *infra*).[32] Because CSX could have made such a decision for "a legitimate purpose," the district court had "rightly concluded that there had been no violation of § 1" (Pet. App. 9a, *infra*).

As to petitioner LSG's antitrust standing, the court of appeals also agreed with the trial court's ruling that under "[t]he standard for recovery under § 4 of the Clayton Act . . . articulated in . . . *Illinois Brick* . . . LSG was an indirect purchaser, and for that reason LSG had no standing to sue" (Pet. App. 9a-10a, *infra*). Distinguishing this Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the court of appeals inexplicably stated that the case was "inapposite" because "[u]nlike the subscriber [in *Blue Shield*], LSG would have been the focus of the alleged conspiracy" (Pet. App. 10a, *infra*). And ignoring LSG's explicit de-

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[32] Without addressing the district court's acknowledgement of "showings by the plaintiff of agreements between CSX and Millville Quarry, Inc. that well could be found at trial to be illegal restraints of trade" (Pet. App. 16a, *infra*), the court of appeals added that even "the rate and rail transactions between CSX and Millville as well as [sic] the alleged incidents of conspiracy may have been motivated by lawful business concerns rather than an illicit end" (Pet. App. 9a, *infra*).

scription of its claim as being for damages resulting from its collusive exclusion from the market (A. 45-46), the court further distinguished *Blue Shield* by characterizing LSG's losses as "only lost potential savings on transportation costs through direct purchaser MMR" (Pet. App. 10a, *infra*).[33]

REASONS FOR GRANTING THE WRIT

A.

Congress was emphatic in its deliberations on the Staggers Rail Act of 1980 that anticompetitive behavior involving rail transportation contracts—the new, free-market substitute for ICC-regulated tariff rates—should be controlled under "the existing Federal antitrust laws." *See supra* pp. 5-6. In this case, contrary to Congress' intentions, the courts below have diluted long-standing principles of antitrust conspiracy law so as to sanction a major railroad's use of its power in the transportation market in furtherance of the anticompetitive aims of an important shipper.

The effect of the decisions below is not confined to the railroad industry, moreover, but significantly undermines the general effectiveness of the antitrust laws. In their zeal to implement this Court's *Monsanto* and *Matsushita* decisions,[34] the courts below have cast in doubt the continued validity of three well-established doctrines of conspiracy law: (i) the rule against tightly compartmentalizing the evidence in determining whether a conspiracy exists, (ii) the rule that separate agreements for each act in furtherance of a conspiracy need not be shown, and (iii) the rule that otherwise-lawful acts become unlawful

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[33] The court also alluded to LSG's "possible profits from trackage rights" (Pet. App. 10a, *infra*), but the meaning of this is unclear.

[34] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

when taken pursuant to an unlawful conspiracy. Rather than seek to reconcile the principles involved, as some other Circuits have done, the courts below have instead opened the door to collaborative action that until now would unquestionably have been deemed collusive and hence unlawful. This Court should intervene to prevent an erosion of principles painstakingly built up over almost 100 years to protect the integrity of the Sherman Act's basic prohibitions.

1. The courts below seemed to think that, for summary-judgment purposes under *Monsanto* and *Matsushita*, the traditional principles of antitrust conspiracy law that prescribe the method of analysis for determining whether challenged conduct is "consistent with illegal conspiracy" should be disregarded. Thus, both the district court and the court of appeals ignored the prohibition against "tightly compartmentalizing the various factual components [of the alleged conspiracy] and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). The evidence was analyzed as if the alleged Section 1 violation consisted entirely of CSX' refusal to grant "trackage rights" to MMR, and the lawfulness of that one act was evaluated wholly without reference to its place in the pattern of exclusionary contracts and agreements entered into between CSX and Millville.

Nothing in *Monsanto* or *Matsushita*, however, purports to overrule *Continental Ore* or the fundamental principle it reflects.[35] Some other Circuits have recognized this, opting to maintain the applicability of the rule against fragmentation in antitrust cases.[36] But the courts below

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[35] *Continental Ore* merely restated the classic warning of *United States v. Patten*, 226 U.S. 525, 544 (1913), that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

[36] *Key Enters. of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1564 (11th Cir. 1990); *In re Coordinated Pretrial Proceedings In*

took a different tack, analyzing one by one each of the "transactions" and "incidents" relied upon by plaintiffs to show the conspiracy "as if they were completely separate lawsuits" (*Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1564 (11th Cir. 1990)), and never looking at "the whole picture" as required.[37]

2. The court of appeals did not explain why it thought petitioner's evidence did not "tend[] to exclude the possibility" of independent action by CSX in rejecting the LSG/MMR "trackage rights" request (Pet. App. 8a, *infra*), except to find a "possible and plausible motivation" in CSX' professed desire to "maintain[] a profitable relationship with subsidiary railroads . . . [as] feeder railroads" supplying traffic for CSX itself to carry (Pet. App. 9a, *infra*).[38] But as a matter of basic conspiracy law, "an overt act of one partner may be the

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Petroleum Products Antitrust Litigation, 906 F.2d 432, 441-42 n.2 (9th Cir. 1990), *petition for cert. filed sub nom. Chevron Corp. v. Arizona*, 59 U.S.L.W. 3726 (U.S. April 8, 1991) (No. 90-1552); *In re Workers' Compensation Ins. Antitrust Litigation*, 867 F.2d 1552, 1563 (8th Cir.), *cert. denied*, —— U.S. ——, 109 S. Ct. 3247 (1989); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254-55 (2d Cir.), *cert. denied*, 484 U.S. 977 (1987).

[37] The definition of "agreement" or "conspiracy" endorsed by the Supreme Court in *Monsanto*, 465 U.S. at 765-66, to which the court of appeals paid lip service (Pet. App. 7a, *infra*), is that formulated by the Third Circuit in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) ("a conscious commitment to a common scheme designed to achieve an unlawful objective"). It is worth noting that in *Sweeney*, the Third Circuit thought it useful also to repeat its colorful observation that "[t]he picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age" (637 F.2d at 111, quoting *William Goldman Theatres v. Loew's, Inc.*, 150 F.2d 738, 743 n.15 (3d Cir. 1945)).

[38] For its part, the district court stated only that it could find no "reason to believe that agreements to favor Millville as a competitor in the aggregates market motivated CSX's refusal" (Pet. App. 28a, *infra*).

act of all without any new agreement specifically directed to that act."[39] *E.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940) (Sherman Act § 1); *United States v. United States Gypsum Co.*, 600 F.2d 414, 418 (3d Cir.), *cert. denied*, 444 U.S. 884 (1979) (same). And there is nothing in the record to suggest that CSX took any steps that, under applicable principles of conspiracy law, might have constituted an effective withdrawal from its conspiracy with Millville prior to making its decision to deny MMR's final request for "trackage rights." *See United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978).[40]

Thus, in light of the agreements to favor Millville that are shown by the evidence, no additional, specific agreement to refuse "trackage rights" was necessary to make the refusal an act in furtherance of that agreement. And again as a matter of basic conspiracy law, the fact that a truly independent refusal of "trackage rights" might have been lawful—the central fact relied on by the court of appeals—is irrelevant.[41]

3. In short, it was only by tightly compartmentalizing the case in disregard of this Court's mandate in *Continental Ore*, and then failing to honor the rule that separate agreements for each act in furtherance of an unlawful conspiracy need not be proven and that acts otherwise lawful become unlawful when performed in furtherance of such a conspiracy, that the courts below could

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[39] *United States v. Kissel*, 218 U.S. 601, 608 (1910).

[40] To establish withdrawal, "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators" must be shown. *United States v. United States Gypsum Co.*, 438 U.S. at 464.

[41] *E.g., American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *Phillips v. Crown Cent. Petroleum Corp.*, 602 F.2d 616, 629 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566, 575 n.17 (4th Cir. 1963).

reach the conclusion they did. This long-discredited approach in evaluating evidence of conspiracy was evidently thought to be required at the summary-judgment stage by *Monsanto* and *Matsushita*. This Court should make clear at the earliest possible opportunity that nothing in those decisions was intended to throw back the substantive law of conspiracy to the primitive version applied by both the district court and the court of appeals in this case.

B.

The court of appeals' reading of *Monsanto* and *Matsushita* directly conflicts with the interpretation adopted by the Court of Appeals for the Ninth Circuit in an antitrust case now pending before this Court on a petition for certiorari. *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 906 F.2d 432, 438 (9th Cir. 1990), *petition for cert. filed sub nom. Chevron Oil Corp. v. Arizona*, 59 U.S.L.W. 3726 (U.S. April 8, 1991) (No. 90-1552) (hereinafter "*Chevron*").

1. In *Chevron*, the Ninth Circuit, reversing the district court's grant of summary judgment against a group of antitrust plaintiffs, extensively analyzed this Court's *Monsanto* and *Matsushita* decisions and concluded that they did not empower district courts to "grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible" (906 F.2d at 438).[42] Such a reading, the court observed, "would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case," and thus would be "tantamount to requiring direct evidence of conspiracy"—a requirement this

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[42] *See also* 906 F.2d at 439 ("Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct.")

Court had expressly disavowed in *Monsanto*. (906 F.2d at 439)[43]

The Ninth Circuit found great significance in the emphasis placed by this Court, in *Monsanto* and *Matsushita*, on the possible effects that more stringent requirements for obtaining summary judgment might have on the possibly procompetitive conduct challenged in those cases, *i.e.*, "price-cutting activities" (*Matsushita*) and intra-brand price policies in vertical distribution systems (*Monsanto*). (906 F.2d at 439) Taking its cue from that emphasis, the court held the proper reading of those decisions to be as follows: "[W]here an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior" (*id.* at 440).

2. The opinion of the court of appeals in the instant case stands in sharp contrast to that of the Ninth Circuit in *Chevron*. Nowhere did the court identify (nor does the record suggest) anything in CSX' conduct comparable to the "beneficial procompetitive behavior" emphasized by this Court in *Monsanto* and *Matsushita* and deemed crucial by the Ninth Circuit to the demanding evidentiary burden those decisions impose on plaintiffs. To the contrary, the district court's own conclusion in this case was that petitioner had shown "agreements between CSX and Millville Quarry, Inc. that well could be found at trial to be illegal restraints of trade" (Pet. App. 16a, *infra*).

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[43] Moreover, "requiring judges to ask whether the circumstantial evidence is more 'consistent' with the defendants' theory than with the plaintiffs' theory would . . . essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found," thus "rais[ing] troubling seventh amendment concerns" (906 F.2d at 438).

3. Indeed, the opinion of the court of appeals in this case appears to impose an even more stringent burden on antitrust plaintiffs than the reading of *Monsanto* and *Matsushita* rejected by the Ninth Circuit. Thus, the court of appeals repeatedly faulted petitioner LSG for failing to offer "evidence that *excludes*" the possibility of independent action (Pet. App. 7a-9a, *infra*, emphasis added),[44] even though *Monsanto* and *Matsushita* require an antitrust plaintiff opposing summary judgment merely to come forth with evidence that "tends" to exclude that possibility. Petitioner was effectively required to convince the summary-judgment court that its evidence was beyond doubt—more than it would need to prove to the trier of fact—rather than merely, as required by *Matsushita*, that "the record taken as a whole could lead a rational trier of fact to find for the non-moving party" (475 U.S. at 587).[45]

The summary judgment standard applied by the Ninth Circuit in *Chevron* seeks to protect the *fact-finder's* authority to draw disputed inferences in favor of an antitrust plaintiff. In this case, in contrast, the Fourth Circuit has applied a standard that would withdraw from the summary-judgment court itself, let alone the fact-finder, the authority to draw disputed inferences in favor

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[44] The court of appeals apparently thought it sufficient for granting summary judgment against LSG that the "transactions between CSX and Millville as well as the alleged incidents of conspiracy *may* have been motivated by lawful business concerns rather than an illicit end" (Pet. App. 9a, *infra*, emphasis added)—as if the mere possibility of an inference favorable to the defendant were enough to justify dismissal of a plaintiff's claim. *See also ibid.* ("possible and plausible motivation").

[45] It bears noting that in *Monsanto* this Court held, on facts weaker than these, that "there *was* sufficient evidence for the jury reasonably to have concluded that [there was] an 'agreement' or 'conspiracy.'" 465 U.S. at 765 (emphasis added). *Monsanto*, of course, addressed the standard for granting a directed verdict, but the standard for granting summary judgment is no different. *Matsushita*, 475 U.S. at 588.

of the plaintiff. Even more than the expansive interpretation of *Monsanto* and *Matsushita* rejected by the Ninth Circuit in *Chevron*, the summary judgment standard applied by the court below "would seriously undercut the effectiveness of the antitrust laws" (906 F.2d at 439). It cannot be reconciled with the standard adopted by the Ninth Circuit, and this Court should resolve the conflict.

C.

As an alternative ground for disposing of petitioner LSG's claims without a trial, both the district court and the court of appeals ruled that LSG was no more than a would-be "indirect purchaser" from CSX and that it consequently lacked antitrust standing under this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). This was a fundamental mischaracterization of LSG's claims, and flowed from the same misperception discussed in Part A, *supra*—the misperception that LSG's only complaint was against CSX' refusal of "trackage rights" to MMR, which LSG wished merely in turn to "purchase" from the latter.

Once it is recognized that the rulings below on the conspiracy/summary judgment issue were based on an impermissible fragmentation of LSG's case (as we argue in Part A, *supra*), the supposed rationale for deeming *Illinois Brick* applicable disappears, and the "indirect purchaser" doctrine can no longer be said to bar LSG's entitlement to a trial of its claims on the merits. On its own terms, moreover, *Illinois Brick* has nothing to do with this case. The decisions below extend the principle of that ruling far beyond its intended or logical scope. And insofar as the courts below relied on *Illinois Brick* to dispose of LSG's well-pleaded claim for injunctive relief, their decisions are in conflict with the clear holdings of two other Circuits.

1. This case was brought for both damages and injunctive relief against CSX' use of its control over rail transportation in the Baltimore-Washington corridor to

exclude petitioner LSG from the construction aggregate market. Damages were sought pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, and injunctive relief pursuant to Section 16, 15 U.S.C. § 26. (A. 13, 25-26 (original Complaint); A. 37, 49 (Amended Complaint))

As this Court held in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 & n.6 (1986), "[i]t is plain that § 16 and § 4 do differ in various ways," and the differences "mean[] that certain considerations relevant to a determination of standing under § 4 are not relevant under § 16." Specifically citing *Illinois Brick*, the Court stated that "because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16." *Id.* at 111.[46]

Thus, both of the Circuits to consider the question have held that the "indirect purchaser" doctrine of *Illinois Brick* has no application to claims for injunctive relief under Section 16 of the Clayton Act. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 590 (3d Cir. 1979). The reliance of the district court and the court of appeals on *Illinois Brick* to grant summary judgment against LSG on its Section 16 claim is inconsistent with those rulings, and if allowed to stand will call into question the continued vitality of this Court's analysis in *Cargill*.[47]

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[46] "[U]nder § 16, the only remedy available is equitable in nature, and, as we recognized in *Hawaii v. Standard Oil Co.*, [405 U.S. 251, 261 (1972),] 'the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one.'" *Cargill*, 479 U.S. at 111 n.6.

[47] Petitioner did not explicitly raise the § 16 issue below, because it deemed the issue to be subsumed in its broader argument, *infra*, that *Illinois Brick* has no application to *any* aspect of the case.

2. Contrary to the court of appeals (Pet. App. 9a, *infra*), this Court has never held that "indirect purchasers" have no antitrust standing regardless of the nature of the "misconduct" alleged or of the injury suffered. Both in *Illinois Brick* itself [48] and in each and every decision applying or explaining it,[49] the Court has consistently and painstakingly described the rule as one applicable to indirect-purchaser claims for "overcharges." [50] Thus, the *Illinois Brick* restriction "bars suit only in those situations where plaintiff's injury is premised on an 'overcharge' and where, in order to prove that injury, plaintiff must also demonstrate that persons in the chain of distribution between plaintiff and the antitrust violator passed on the overcharge to plaintiff." *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1101 (D. Md. 1979).

The court of appeals offered no rationale for departing from this interpretation except to observe that "[u]nlike the subscriber [in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982)], LSG would have been the focus of the alleged conspiracy" (Pet. App. 10a, *infra*) and to assert—mistakenly—that "LSG only lost potential savings on transportation costs through direct purchaser MMR, and possible profits from trackage rights" (Pet. App. 10a, *infra*). If anything, however, the court's comment only underscores the inapplicability of *Illinois Brick*

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[48] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[49] *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983); *California v. ARC America Corp.*, 490 U.S. 93 (1989); *Kansas v. Utilicorp United, Inc.*, —— U.S. ——, 110 S. Ct. 2807 (1990).

[50] Significantly, when this Court in *Utilicorp United* rejected the argument that *Illinois Brick* was inapplicable to the States' claims because they sought "different, not duplicative, damages" than the utilities, it stressed that the States still were seeking to "recover the amount of the overcharge" while it was the direct-purchaser utilities that would recover for lost sales. 110 S. Ct. at 2815.

to this case. If the very "focus" of an unlawful conspiracy to exclude a competitor from the market has no standing to complain of his exclusion, then who does? It is for precisely this reason that *Illinois Brick* has repeatedly been held not to bar such claims,[51] and the Fourth Circuit's contrary holding in this case sets a mischievous precedent.[52]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 24, 1991

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[51] *K & R Leasing Corp. v. General Motors Corp.*, 551 F. Supp. 842, 844-45 (N.D. Ill. 1982); *Chatham Brass Co. v. Honeywell, Inc.*, 512 F. Supp. 108, 116 (S.D.N.Y. 1981); *Gas-A-Tron of Arizona v. American Oil Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,789 at 73,246 (D. Ariz. 1977).

[52] Moreover, LSG's damage claim was *not* merely for "lost potential savings on transportation costs," much less for "profits from trackage rights." It was primarily for lost profits on the crushed stone that LSG would have sold in the Baltimore-Washington market but that it could not and did not sell because of CSX' collusive exclusion of it from the market. LSG's "transportation costs" were relevant only as a component of what its overall costs would have been, to be considered only in determining how much of its revenue on the lost sales would have been profit and hence recoverable in this action. Nothing in *Illinois Brick* denies standing merely because part of the plaintiff's cost of doing business is the cost of services rendered to it by a customer of the defendant.

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1076

LAUREL SAND & GRAVEL, INC.;
MARYLAND MIDLAND RAILWAY, INC.,
Plaintiffs-Appellants,

versus

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Paul V. Niemeyer, District Judge
(CA-87-1582-PN)

Argued: October 2, 1990 Decided: January 30, 1991

Before ERVIN, Chief Judge, RUSSELL, Circuit Judge, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Russell and Judge Michael joined.

ARGUED: Robert Gene Levy, FRANK, BERNSTEIN, CONAWAY & GOLDMAN, Baltimore, Maryland, for Appellants. Richard McMillan, Jr., CROWELL & MORING, Washington, D.C., for Appellee. ON BRIEF: Berryl A. Speert, Harry J. Katrichis, A. David Demiray, FRANK, BERNSTEIN, CONAWAY & GOLDMAN, Baltimore, Maryland; Fritz R. Kahn, VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND, Washington, D.C. for Appellant Laurel Sand & Gravel; Charles M. Chadwick, CHADWICK & WHALEY, Rockville, Maryland, for Appellant Maryland Midland Railway. Kent A. Gardiner, Shawn N. Sullivan, Nancy J. Spencer, CROWELL & MORING, Washington, D.C.; Fred R. Kirkholz, CSX Transportation, Inc., Baltimore, Maryland, for Appellee.

ERVIN, Chief Judge:

Laurel Sand and Gravel, Inc. ("LSG") and Maryland Midland Railway, Inc. ("MMR") appeal summary judgment in favor of CSX on alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. This Court must determine whether or not the district court erred: (1) in ruling that there was no probative evidence that the refusal of defendant CSX to grant trackage rights to MMR over its rails was prompted by conspiracy, (2) in holding that LSG lacked standing under § 4 of the Clayton Act, (3) in dismissing MMR's claim under § 2 that CSX denied it access to an "essential facility" by refusing to sell MMR trackage rights. Finding no error in the district court's decision, we affirm.

I.

LSG, a manufacturer and distributor of sand and gravel, and MMR, a shortline railroad, sued CSX, a national railroad. In Count I of their two-count complaint, both contended that CSX conspired with Millville Quarry, Inc. ("Millville"), LSG's competitor, to keep LSG out of the Washington, D.C./Baltimore aggregate material (sand, gravel, and crushed stone) market in violation of

§ 1 of the Sherman Act. In Count II, only MMR alleges that CSX, in violation of § 2, monopolized a second market defined as "rail transportation of aggregate[s]" to the Washington/Baltimore market by refusing to grant MMR access to an essential facility, namely CSX's tracks.

The lower court entered summary judgment in favor of CSX on both counts of the complaint. Moreover, the court dismissed the claims of LSG because it lacked standing.

II.

These three decisive issues emerge from the following facts. LSG was incorporated in 1982, and thereafter acquired a site for the production and distribution of its product, sand and gravel, midway between Washington and Baltimore. The site was adjacent to an intersection of railroad lines known as Annapolis Junction. The main line running through the junction ran north-south and was owned by CSX.

In 1982, LSG made known its plan to purchase a quarry in the Washington/Baltimore area to supply that market. LSG informed CSX that it would need to ship material to its Annapolis Junction distribution center via CSX's lines. Four years after its purchase of its distribution center property, LSG acquired Barrick Quarry in Frederick, Maryland, in 1986.

To move stone from Barrick Quarry to the Annapolis Junction distribution center, LSG would have to transport stone via the MMR track running east to west from the quarry to Emory Grove. From Emory Grove it would have to transport from north to south via the CSX rails to Annapolis. In order to actually reach the center once at the junction, LSG needed to use some 1,700 feet of CSX "wye" or spur tracks, which connected LSG's facility to the main rail line. The district court noted that without the connecting tracks LSG would still have access to its distribution center—presumably by building other "wye" tracks.

Following discussions between LSG and MMR about transportation from the quarry, the railroad company contacted CSX in July of 1986 to secure its participation in the transportation of LSG's aggregates. CSX proposed a rate of $2.95 per ton to transport on its tracks. MMR and LSG concluded that the price given was an "exit offer," an offer not meant to be accepted.

On November 7, 1986, the two companies made a request to CSX that it provide "trackage" rights, the use of its tracks without its trains. MMR and LSG anticipated that such rights would be substantially cheaper at a rate of $.25 per ton. CSX refused the request and stated that it preferred to work with them by adjusting the rates offered rather than to bargain for trackage rights. After this litigation began, CSX made an offer of $2.12 (one cent above its variable costs, by the company's calculations). According to the district court finding, the last rate offer, combined with the $1.55 rate MMR was prepared to charge LSG, still exceeded the transportation costs of LSG's competitor Millville. Millville's quarry was closer to Annapolis Junction than LSG's quarry. Thus, Millville required transportation by CSX rails only.

LSG and MMR allege that the "exit rate" and refusal of trackage rights were prompted by a conspiracy between CSX and Millville Quarry, Inc. to impede competition among suppliers of aggregate materials to the Washington/Baltimore market. LSG and MMR assert that this conspiracy was based on transactions between Millville and CSX that occurred before the rate offer and trackage rights refusal.

Prior to LSG's purchase of the distribution center in 1982, Millville expressed an interest to CSX in establishing a distribution center at Annapolis Junction. It leased a portion of a spur line that ran off the main line at

Annapolis Junction. It also owned property adjacent to CSX tracks. Sometime in 1984, CSX leased the remainder of the spur line to Millville.

In 1985, CSX and Millville entered into the first of two "unit" train agreements.[1] The second agreement was made in 1987. Traditionally, companies needing the transportation of aggregates have relied on trucks. CSX tried to promote its services in this area. It had about a 5% market share, largely due to entry into the market by reason of the two unit train agreements with Millville.

On one of the unit train agreements Millville was given a rebate so that the effective rate was between $2.50-2.60 (Charles Town, West Virginia, to Annapolis Junction). The second rate, from Hanover, Pennsylvania, to Annapolis Junction, was $2.80-3.00, depending on volume.

CSX promised Millville a "most favored nations clause" which provided that if CSX granted a competitor of Millville a lower rail rate, Millville would be allowed to terminate its contract.

LSG and MMR contend that Donald Sanchez of CSX and Larry Campbell of Millville entered into the actual conspiracy sometime prior to July 1982. This conspiracy is allegedly demonstrated by the following incidents:[2]

1. *A 1984 lease agreement between CSX and Millville*

This agreement ostensibly blocked LSG from access to its facility at Annapolis Junction. LSG alleges that this site is one of the few rail-served sites in the Washington/Baltimore corridor. Millville's leased spur tracks do block access from LSG to the CSX main railway. As the dis-

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[1] Under a "unit" agreement a rail company agrees to devote an entire train to the transportation of a given product, rather than individual box cars.

[2] It is pointed out that these events occurred over a five-year period beginning in 1982.

trict court noted, however, access is only blocked *at that particular point.*

2. *CSX's rate increase to Millville's competitor*

CSX allegedly increased the rail rates offered to Rockville Crushed Stone, Inc. ("RCS"), a Millville competitor. The rates were increased after the parties had agreed on an initial price. It is unclear, however, whether the increase was sought to protect Millville or to simply get a better price.

3. *CSX's conveyance of Fulton Distribution Facilities to Millville rather than its competitor Baltimore Asphalt and Paving Co. ("BAPCO")*

LSG and MMR argue that Millville only sought the facility when it found out about BAPCO's interest in purchasing it for the purpose of distributing stone in the Baltimore area. CSX conveyed the facility to Millville even though the latter already had another distribution facility in the area. Moreover, the facility was never used by Millville once purchased. Millville did, however, make the highest bid.

4. *CSX offered LSG a noncompetitive rate for the transportation of aggregate materials in order to protect Millville*

This issue is the heart of the district court opinion. The court found that the rate (one cent above CSX's variable cost) was still greater than the transportation cost of Millville. It seems that no joint track agreement would have made LSG competitive with Millville, making trackage rights the only economically viable option.

Moreover, LSG executive vice president Ron Matovcik testified that even the $3.38 total joint line rate initially proposed by MMR (which included a $1.83 rate for CSX's portion of the haul) was unacceptable to LSG because it was not competitive with Millville's rate.

MMR and LSG's railroad expert, Richard Levin, expressed skepticism that any rate higher than Millville's "effective rate" of $2.50-2.60 would be acceptable to LSG. Given that MMR wanted a rate of $1.55 for its services, LSG would have only been able to compete with Millville by paying CSX a $1.00 rate. He calculated the cost to CSX at $1.67-1.72.

III.

Fundamentally, for there to be a violation of § 1 of the Sherman Act two or more persons must act in concert. Generally, a business has the right to deal or not deal with whomever it likes, as long as it does so independently. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *United States v. Colgate & Co.*, 250 U.S. 300 (1919). An agreement to restrain trade may be inferred from other conduct. When such conduct is ambiguous, there are two possible judicial interpretations. First, the suspect agreement may be found consistent with independent conduct or a legitimate business purpose. See *Monsanto*, *supra*; *Terry's Floor Fashions, Inc. v. Darlington, Inc.*, 763 F.2d 604, 611-12 (4th Cir. 1985). Second, it may be consistent with the illegal agreement. To prove a violation through ambiguous conduct, proof must be offered that tends to exclude the first interpretation. *Id.* Moreover, it must be shown that there is a common scheme to achieve an illegal goal. In *Monsanto* the Supreme Court held that:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [alleged coconspirators]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the [conspirators] had a conscious commitment to a common scheme designed to achieve an unlawful objective.

465 U.S. at 768.

Specifically in the context of summary judgment, the Supreme Court has held that an antitrust plaintiff must

offer evidence that excludes the possibility of independent conduct. In *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court stated:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764. See also *Cities Service*, [391 U.S.] at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764.

Id. at 588.

Given the *Monsanto/Matsushita* standard, LSG and MMR must discharge a twofold evidentiary burden. First, they must establish that CSX and Millville had a "conscious commitment to a common scheme designed to achieve an unlawful objective." Second, LSG and MMR must bring forward evidence that excludes the possibility that the alleged coconspirators acted independently or based upon a legitimate business purpose. As the district court concluded, they were unable to discharge this burden and thus fail on both counts of their complaint.

With regard to the first element, there is no direct evidence of a common scheme. Instead, LSG and MMR offer as evidence of a conspiracy transactions between CSX and Millville completed before the rate offer and trackage rights refusal. Moreover, they point to the aforestated incidents as demonstrating a conspiracy.

This evidence, however, fails to exclude the possibility that the denial of trackage rights was a unilateral deci-

sion by CSX prompted by legitimate business concerns. Moreover, the rate and rail transactions between CSX and Millville as well as the alleged incidents of conspiracy may have been motivated by lawful business concerns rather than an illicit end.

Undergirding CSX's refusal of trackage rights is the possible and plausible motivation of maintaining a profitable relationship with subsidiary railroads. CSX had a vested interest in continuing to have such companies function as feeder railroads. These smaller railroads, with less track, feed CSX the traffic they are unable to carry. For CSX to rent its track to such a railroad, it would relinquish one means of profit (providing rail service) for another (providing track) and alter the nature of its business. It is a legitimate purpose to seek to maintain the nature of one's business. Given LSG and MMR's failure to discharge their dual evidentiary burden, the lower court rightly concluded that there had been no violation of § 1.

IV.

The standard for recovery under § 4 of the Clayton Act, 15 U.S.C. § 15, was articulated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In both cases, the Court held that where a series of direct and indirect purchasers claim injury as a result of a seller's misconduct, the direct purchasers are deemed to be the only persons injured in their business or property within the meaning of § 4, and indirect purchasers are not given a right to sue. 392 U.S. at 487; 431 U.S. at 746. In *Illinois Brick* the Court stated:

> [T]he antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

Id. at 735. The trial court rightly concluded that under such a standard, LSG was an indirect purchaser, and for that reason LSG had no standing to sue.

LSG relies on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), to argue that § 4 may be read broadly to allow recovery for an injury under common law proximate cause analysis.

In *Blue Shield*, the Court allowed standing for a patient denied reimbursement from a health plan for the use of the services of a psychologist. The Court held that while the conspiracy was directed at psychologists for the benefit of competing psychiatrists, it was the denial of the subscriber's reimbursement that was the means Blue Shield used to effect its conspiracy. 457 U.S. 465.

Like the subscriber in *Blue Shield*, LSG would seem to suffer from the alleged conspiracy to inhibit competition in the Baltimore/Washington aggregate market. Moreover, both the refusal of the health plan and that of CSX were the alleged means of the conspiracies. The similarities, however, end here; the dissimilarities between *Blue Shield* and the instant case make the former inapposite. Unlike the subscriber, LSG would have been the focus of the alleged conspiracy. Moreover, the results of the conspiracies were different. While the subscribers suffered direct and readily discernible economic harm from the health plan's refusal to reimburse them for psychological care, LSG's harm from the refusal of trackage rights is discernible but indirect. The subscriber lost money spent for a psychologist's care; LSG only lost potential savings on transportation costs through direct purchaser MMR, and possible profits from trackage rights. Under the *Hanover Shoe/Illinois Brick* standard, LSG as an indirect purchaser has no standing.

V.

MMR, the only plaintiff on Count II, claimed that CSX's refusal to grant trackage rights was an improper exercise of monopoly power in violation of § 2 of the

Sherman Act. The lower court rightly found the claim to be invalid. For MMR to make a § 2 violation claim, it had to demonstrate two facts. First, CSX must have possessed a monopoly power in the market of aggregate transportation (either rail or both nonrail and rail transportation). *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Griffith*, 334 U.S. 100 (1948). Second, MMR had to establish that CSX engaged in exclusionary conduct to maintain, use, or extend that power. *Id.* Were CSX a monopolist, a misuse of power could be shown if there was no legitimate business reason for its conduct. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

MMR relies on the essential facilities doctrine to establish its § 2 claim. In order for such a violation to be shown four elements must be proven: (1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility. *See MCI Communications v. American Telephone and Telegraph Co.*, 709 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

With respect to the first element, that CSX possessed monopoly power over an essential facility, MMR argues that trackage rights are the only economically practical means of aggregate transportation between Emory Grove and Annapolis. MMR contends that the relevant market is the rail transportation of aggregates to the Washington/Baltimore corridor. Were that the case, CSX is a monopolist as it controls the only rails that would allow MMR to reach the corridor from Emory Grove. Alternatively, the market might be defined as aggregate transportation services, including rail and nonrail. Since MMR fails to meet elements (2), (3), and (4), we need not attempt to determine whether CSX did control an "essential facility."

On the second element, MMR failed to show that it could not reasonably duplicate or pursue a reasonable alternative to the essential facility. There were three alternatives available: building additional tracks, purchasing train service from CSX, and trackage rights. While the first was economically impractical, the second was reasonable from CSX's perspective. CSX's offer of $2.12 per ton, a penny over the variable costs, was reasonable. While such a rate would not have allowed LSG to compete with Millville's transportation cost, it, however, was still less than the rate Millville paid CSX. Although trackage rights were preferable, that, alone, did not make the rate offer unreasonable.

MMR fails on the third element as well. Access to the essential facility was not refused through the rail rate offer and the trackage rights denial. MMR was not denied access for two reasons. First, the record makes clear that any rate offer over $1.00 would have been more than MMR and LSG could profitably pay. Second, the reasonable standard of the access factor can not be read to mean the assurance of a profit for LSG, and LSG's business for MMR.

Finally, MMR fails on the feasibility element. The feasibility of providing access to the tracks must be analyzed not in terms of all the possibilities of CSX as a railroad, but in the context of its normal course of business. There is no evidence that CSX rents track to subsidiary railroads. Within its existing course of business, providing rail transportation service, it is not feasible for CSX to rent track to MMR. CSX has articulated a number of legitimate business reasons for refusing trackage rights, including altering its relationship to "feeder" lines, upon which it relies for profitable traffic. As the district court noted, for CSX to rent track, it would alter its relationship to feeder railroads and transform itself into a "toll collector." It is not feasible for

CSX as a transportation service-provider to grant trackage rights. The decision as to Count II is affirmed.

VI.

For the reasons discussed above, the district court's grant of summary judgment in favor of CSX is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PN-87-1582

LAUREL SAND & GRAVEL, INC. and
MARYLAND MIDLAND RAILWAY, INC.

v.

CSX TRANSPORTATION, INC.

Filed: January 26, 1989

Robert G. Levy, Esq., Leonard E. Cohen, Esq., Berryl A. Speert, Esq., Harry J. Katrichis, Esq., A. David Demiray, Esq. and Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland; Fritz R. Kahn, Esq., Washington, D.C.; for plaintiffs; and Charles M. Chadwick, Esq., Chadwick & Whaley, Rockville, Maryland, for plaintiff Maryland Midland Railway, Inc.

Richard McMillan, Jr., Esq., Kent A. Gardiner, Esq. and Crowell & Moring, Washington, D.C.; Rachel E. Geiersbach, Esq., Baltimore, Maryland,; for defendant.

Niemeyer, United States District Judge.

OPINION AND ORDER

This antitrust case raises the issues whether the refusal by the defendant railroad company to give the plaintiffs the right to use its tracks (trackage rights) was pursuant to and in furtherance of a conspiracy to restrain trade in violation of § 1 of the Sherman Act; and whether the same refusal was an abuse of a monopoly power that the railroad company is alleged to have in a market defined by the plaintiffs to be the rail transporta-

tion of aggregate materials to the Baltimore-Washington area in violation of § 2. An issue of standing to sue has also been raised.

Laurel Sand & Gravel, Inc., a manufacturer and distributor of aggregates such as crushed stone, and Maryland Midland Railway, Inc. (MMR), a shortline railroad company having 67 miles of track, have sued CSX Transportation, Inc., a national railroad company having 20,000 miles of track. In Count I of the two count complaint, plaintiffs allege that CSX conspired with Millville Quarry, Inc., a competitor of Laurel Sand & Gravel, to exclude Laurel Sand & Gravel from the aggregates market in the Baltimore-Washington corridor in violation of § 1 of the Sherman Act. In Count II MMR (the only plaintiff in Count II) alleges that CSX, in violation of § 2 of the Sherman Act, monopolized a market defined as "rail transportation of aggregate materials to the Baltimore-Washington corridor" by refushing to grant MMR access to an essential facility, i.e., tracks controlled by CSX.

Following the filing of a motion for summary judgment by CSX, the parties submitted exhaustive, well-written, and well-documented briefs that included the core materials of evidence that would be presented at trial. They also filed a complete pretrial order, accompanied by pretrial memoranda, that has been entered in the case. On January 12, 1989, the Court heard oral argument for an entire day and thereafter studied additional submissions of the parties.

The Court has concluded that the historical facts are not substantially in dispute, at least as to those that are considered material, and that a trial will not advance resolution of the disputes raised by this case. Rather, the resolution of this case will turn on an analysis of the antitrust implications of the historical facts, which are questions of law under the standards set forth by the Supreme Court in *Matsushita Electric Industrial Company Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Although there are showings by the plaintiff of agreements between CSX and Millville Quarry, Inc. that well could be found at trial to be illegal restraints of trade, the denial of trackage rights, which forms the sole basis of plaintiffs' claims in this case, has not been shown to be pursuant to or in furtherance of an illegal conspiracy. The denial of trackage rights also does not form the basis of an illegal monopolization under § 2 of the Sherman Act.

For the reasons that are given hereafter, the Court will enter summary judgment in favor of CSX on both counts of the complaint.

I.

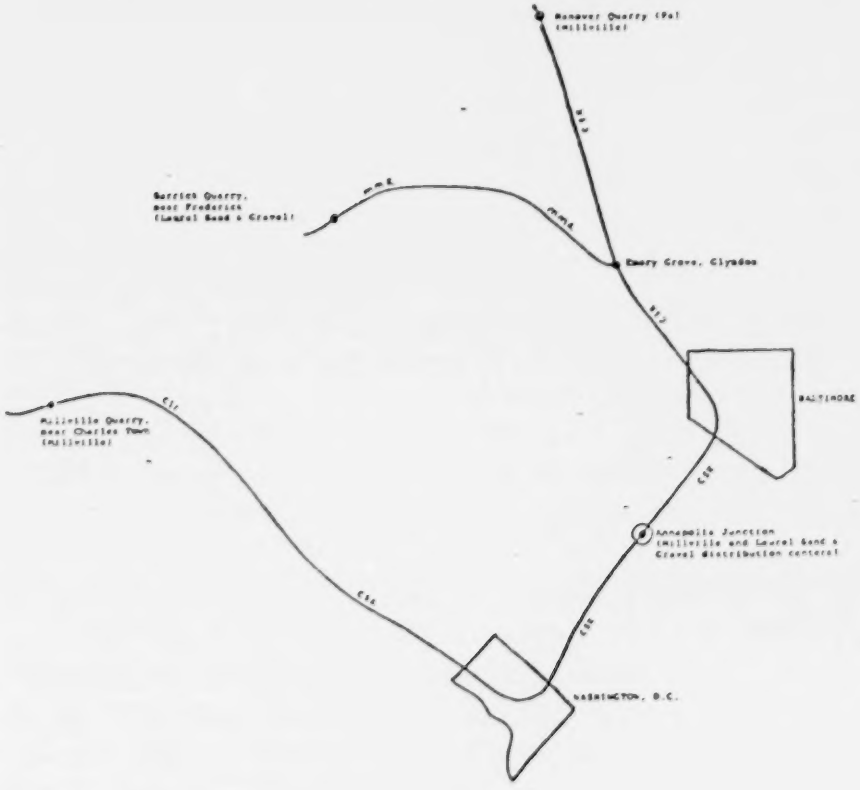
FACTS

Transactions between plaintiffs and CSX.

Laurel Sand & Gravel, Inc. was incorporated in 1982 and thereafter acquired a site for the production and distribution of sand and gravel located mid-way between Baltimore and Washington, adjacent to a junction of railroad lines known as Annapolis Junction. The main rail line running through Annapolis Junction, generally in a north-south direction, is owned by CSX. With the imminent depletion of reserves and increasing demand in the Baltimore-Washington area for aggregates such as sand, gravel and crushed stone, Laurel Sand & Gravel planned to acquire a stone quarry within the general area and ship crushed stone by rail into its Annapolis Junction site for distribution. During its planning, Laurel Sand & Gravel had concluded that when transporting aggregates more than 35 miles, rail transportation would provide greater efficiencies than truck transportation and therefore reduce its transportation costs. It contends that in 1982 it made known to CSX its plan to acquire a quarry and requested rail access into the site. Access to the site would involve the acquisition or con-

struction of a spur track off of the main CSX line into the site.

After it acquired the Annapolis Junction property in 1982, Laurel Sand & Gravel undertook to locate a quarry. In 1986, some four years later, it purchased Barrick Quarry near Frederick, Maryland, which was located on the line of MMR. The MMR track ran essentially east and west and connected with CSX's main line at a point northwest of Baltimore known as Emory Grove in Glyndon, Maryland. To transport stone, therefore, from the Barrick quarry into the Annapolis Junction distribution facility, Laurel Sand & Gravel would have to make arrangements with both MMR and CSX under a "joint line" agreement. See the map that follows.



Following discussions between Laurel Sand & Gravel and MMR, during which MMR proposed a joint line rate of $3.38 per ton for transporting stone from the Barrick Quarry into Annapolis Junction, MMR contacted CSX in July of 1986 to enlist its participation. MMR proposed to CSX that MMR charge Laurel Sand & Gravel $1.55 per ton for the trip from Barrick Quarry to Emory Grove, and that CSX transport the stone from Emory Grove into Annapolis Junction at a rate of $1.83 per ton, for a total of $3.38 per ton. CSX reviewed the proposal and its cost, as well as the impact that the proposal would have on its relationship with Millville Quarry, Inc., an existing customer and a competitor of Laurel Sand & Gravel. In November 1986, after numerous meetings and inquiries from Laurel Sand & Gravel, CSX proposed a rate of $2.95 per ton for its portion of the trip.

When MMR and Laurel Sand & Gravel received this quotation, they determined that the price was too high and considered it an "exit" offer—an offer not made to be accepted. They thereupon made a request in a letter dated November 7, 1986, that CSX provide "trackage rights," i.e., that CSX rent MMR the use of its tracks, without CSX providing any transportation service. Plaintiffs anticipated that this would cost them about $.25 per ton. CSX refused the request and stated that it preferred "to work with [plaintiffs] through revenue adjustment [on transportation service] rather than through a trackage right arrangement." An internal memorandum that provided input into this decision at CSX contained the recommendation of the director of shortline sales as follows:

> It is my personal view that this matter is essentially a marketing decision, recognizing that the significant operating problems presented by this request would require considerable effort to resolve. From a sales standpoint, however, I am opposed to this

> proposal because of the precedent it may set. . . . Carried to an extreme, CSX could be reduced to a toll collector.

The parties thereafter pursued negotiations during which the proposed rate for transportation service from Emory Grove to Annapolis Junction was reduced. At the threat and threshold of litigation, CSX decided to offer what it considered a break even proposition, "one cent over the variable cost as it computed it," of $2.12 per ton. At the hearing in court CSX conceded that the final offer was not a profitable rate for CSX but was made in an attempt to avoid suit. It was transmitted to the plaintiffs shortly after this suit was filed.

It became apparent, however, from the record and the discussions with counsel for Laurel Sand & Gravel at the hearing, that even if the $2.12 offer had been made earlier, it would not have allowed Laurel Sand & Gravel to be competitive. Laurel Sand & Gravel still would have to pay MMR $1.55 for the leg of the trip that ran from Frederick to Glyndon, for a total of $3.67 per ton, which was significantly more than was being paid by Millville Quarry, Inc. for transportation of its crushed stone to Annapolis Junction. Since the offer from CSX of $2.12 per ton could not be accepted by plaintiffs, that transaction is not the subject of the claim in suit. Rather, plaintiffs have sued solely because CSX refused to rent to MMR the tracks for use by MMR.

Transactions between Millville and CSX.

Sometime before 1982 (before Laurel Sand & Gravel acquired its Annapolis Junction site) Millville Quarry, Inc. and affiliated companies, all of whom are referred to by counsel and the court as Millville, expressed to CSX an interest in establishing a stone distribution center at Annapolis Junction, and in early 1982 it leased a portion of a spur line that ran off of the main line at

Annapolis Junction. It also owned property there adjacent to the CSX tracks.

Millville established a distribution center at Annapolis Junction, and sometime in 1984 CSX leased to Millville the remainder of the spur line at Annapolis Junction. As it turned out, this effectively blocked any potential access *from that line* into Laurel Sand & Gravel's distribution center. The lease agreement also permitted Millville to exclude other users from using the spur line, a provision that plaintiffs suggest is unusual in the railroad industry.

In 1985, following years of planning, Millville and CSX entered into the first of two unit-train transportation contracts for the transporting of aggregates to Annapolis Junction from Millville's quarry in Millville, West Virginia, near Charles Town. A unit-train contract is one that dedicates the use of an entire train to the transportation of a customer's product. In 1987 they entered into a second and similar contract for transportation of aggregates from Millville's quarry in Hanover, Pennsylvania.

Traditionally transportation of aggregates in the Baltimore-Washington area has been by truck and barge, and most competitors still use these forms of transportation. CSX began promoting its "rock runner," unit-train service to obtain some of the business of transporting aggregates by railroad in this market and by its estimate, it has obtained something less than five percent of the market. Its principal entree into the market was obtained through the negotiation of these two unit-train rail transportation contracts with Millville, beginning in 1985.

These contracts provide for transportation from Millville's quarry near Charles Town, West Virginia, into distribution points in Bladensburg, Maryland, (on the northeast side of Washington, D.C.) and Annapolis Junction; and from Hanover, Pennsylvania, into distribution

points in Baltimore and Annapolis Junction. See the map set forth above. The rate agreed to by Millville and CSX for the transportation of aggregates from the West Virginia quarry to Annapolis Junction range between $2.60 and $3.07 per ton, depending on the tonnage. With scheduled rebates the plaintiffs have computed the effective rate to be somewhere between $2.50 and $2.60 per ton. The Hanover quarry contract provides for rates between $2.80 to $3.00 per ton, depending on volume. Because both of Millville's quarries and its distribution center were on the CSX lines, both contracts involved transportation over CSX lines exclusively.

CSX valued its relationship with Millville and, as reflected in its documents, pursued a policy to protect this business. One of its internal memoranda spoke of a strategy to "treat competition fair but not at the expense of [Millville] so as to lose goodwill and bargaining integrity." The record shows that Millville was well aware of CSX's desire to protect the business established with it and it used its valuable relationship to advantage. CSX promised Millville a "most favored nations" clause agreeing, that if CSX were to allow any other competitor a rail rate less than that allowed to Millville, Millville could terminate its rail transportation contracts with CSX. CSX also assisted Millville in obtaining distribution points along the track by selling to Millville sites in Baltimore known as the Fulton Station facility and the Westport tract.

Alleged conspiracy.

The plaintiffs contend that CSX entered into agreements with Millville that resulted in the denial of competitive rail service to Laurel Sand & Gravel and others in the Baltimore-Washington market for aggregate materials. They contend that in furtherance of the agreements, CSX denied MMR trackage rights to the Baltimore-Washington market.

The actual conspiracy that is alleged to have been formed between CSX and Millville was allegedly entered into by Mr. Donald Sanchez of CSX and Mr. Larry A. Campbell of Millville sometime before July 1982. It is alleged that these two agreed to exclude Laurel Sand & Gravel from the aggregate market as a competitor of Millville. They argue that the agreement can be inferred from five incidents that occurred over the years.

First, they point to the 1984 lease agreement between CSX and Millville which blocked Laurel Sand & Gravel's rail access to its production and distribution facility at Annapolis Junction, which they contend is one of the few rail-served sites suitable for the distribution of aggregates in the Baltimore-Washington corridor.

Second, they allege that in early 1985 CSX increased rail rates which it had previously offered to Rockville Crushed Stone, Inc., a company that competed with Millville and Laurel Sand & Gravel. Rockville Crushed Stone intended (if it could secure appropriate zoning from Montgomery County to open a quarry) to transport aggregates by rail from a quarry known as Boyd's in Montgomery County to Rockville, Bladensburg, and a facility near Annapolis Junction on the CSX mainline. The plaintiffs allege that CSX raised the rates offered to Rockville Crushed Stone to protect Millville from the potential competition.

Third, they allege that CSX eliminated potential competition from Baltimore Asphalt & Paving Company (BAPCO) and Martin Marietta Aggregates, Inc. by conveying the Fulton Station distribution facility to Millville instead of to BAPCO, who wanted the site. They argue that Millville only sought that location when it learned of BAPCO's interest in purchasing it for the purpose of distributing crushed stone in the Baltimore market. CSX conveyed the Fulton Station facility to Millville even though Millville had another rail served distribution facility nearby in Westport which was also lo-

cated in Baltimore. After the acquisition, the Fulton Station facility was never used by Millville.

Fourth, they allege CSX protected Millville by offering Laurel Sand & Gravel a noncompetitive rate for transportation of aggregate materials from Emory Grove to Annapolis Junction as part of the joint-line agreement with MMR. This was the initial $2.95 per ton quotation that was discussed above.

Finally, they allege that in 1983 CSX retained ten feet of track near Westminster as a "spite strip" which was deliberately designed to prevent the State of Maryland and MMR from securing a through-rail route from MMR's lines to Emory Grove in Glyndon, Maryland. They also contend that CSX denied MMR access to over 17 miles of track between Highfield, near Frederick, and Hagerstown.

Each of these transactions may be potentially consistent with the anti-competitive agreement alleged. On the other hand, CSX has tendered a rational business explanation for each of the transactions.

With respect to the 1984 lease to Millville of the land and track rights at Annapolis Junction, CSX points out that although in the early 1980's Millville had shipped some stone by means of regular train service to its Bladensburg location, high volume, unit-train movement of crushed stone was an untested concept in Maryland. Millville felt that careful planning with several distribution sites would be needed to make the concept work and to justify substituting that service for the more flexible truck-type service. With respect to the allegation that the lease blocked Laurel Sand & Gravel from the main track, CSX points out that that is simply not true. The maps seem to confirm that even though the portion of track that was conveyed to Millville blocks access *at a particular point*, other points of Laurel Sand & Gravel's property are contiguous to the CSX tracks from which a spur

track could be built. CSX notes further that the lease with Millville occurred at a time when Millville was actively developing its distribution center, and Laurel Sand & Gravel did not even own a stone quarry. Finally, CSX had been told that Laurel Sand & Gravel had a long-range plan to develop its Annapolis Junction site into an industrial park whereas Millville was prepared to make a long term commitment to ship a substantial volume of crushed stone by rail from that location. CSX observed that "understandably it elected to sell the property to the 'bird in hand' in order to facilitate the movement of a major new quantity of stone on CSX rail lines."

With respect to the Rockville Crushed Stone price change, CSX observes that the increases in rates that it was quoting to Rockville Crushed Stone were normal increases and that through negotiations CSX actually had to back off of certain increases that were proposed. CSX points out that its method of negotiation was vindicated because CSX and Rockville Crushed Stone actually did execute a rail transportation contract providing for rail deliveries from the Boyd's quarry.

With respect to the Fulton Station site, CSX points out that it put the property up for bid after several parties expressed an interest in it. Millville offered both a higher price for the property and offered to move more stone through the property.

Finally, in connection with the "spite strip" to control MMR access to CSX's line, CSX points out that when it sold track to MMR, it retained a ten foot section of track in order to be a participant in any negotiations to re-establish connection between the MMR line and the CSX line. A portion of the line had been washed out by Hurricane Agnes. It points out that in fact it did not impede any connection but rather promoted it, not only by providing the connection but also by selling to MMR an additional four miles of track to make the connnection more

efficient at Emory Grove. With respect to the alleged refusal to give access to the Hagerstown line, CSX points out that it has never refused to interchange traffic with MMR and that virtually all of MMR's revenue is derived from traffic delivered to and from CSX at that point.

Plaintiffs cited the five transactions that are described above simply as evidence of an underlying conspiracy, of which they argue denial of trackage rights was a part. Plaintiffs do not claim damages for any of these transactions. If damages had been claimed for these transactions, it is not at all clear that plaintiffs' claims would survive CSX's motion to summary judgment because CSX's explanations for these transactions might show that its conduct was "as consistent with permissible conduct as with [an] illegal conspiracy" and thus would not support an inference of an illegal conspiracy. *Matsushita, supra*, 475 U.S. at 588. Because plaintiffs only claim damages for the denial of trackage rights, the question for resolution is whether that decision was pursuant to and in furtherance of the conspiracy alleged.

II.

SECTION 1 CLAIM

The antitrust laws represent a strong public policy designed to protect the competitive process. Any analysis of an alleged violation, for that reason, must take into account the economic realities of the market or markets involved to determine whether a plaintiff is simply complaining about losing a competitive battle or whether he has been the victim of an anti-competitive restraint. Only the latter inquiry is suspect under the antitrust laws. *See, e.g., Brunswick Corp. v. Pueblo Bowl-A-Mat Inc.*, 429 U.S. 477 (1977).

Two markets are purportedly involved in this litigation. Laurel Sand & Gravel and Millville compete in the sale of aggregates in the Baltimore-Washington area. This

market is conceded by the plaintiffs to be a competitive one, having perhaps 20 or more participants. Plaintiffs claim, however, that by reason of the conspiracy between CSX and Millville, the additional competition to be provided by Laurel Sand & Gravel has been eliminated or lessened. They also allege in connection with the § 2 claim that competition in the market for the transportation by rail of aggregates to the Baltimore-Washington corridor has been lessened by CSX's denial of trackage rights to MMR pursuant to and in furtherance of the conspiracy with Millville.

Before conducting the appropriate analysis under the applicable caselaw, the critical facts relevant to the conspiracy should be reviewed.

Millville, the purportedly favored customer of CSX, was paying effectively $2.50 to $2.60 per ton to deliver crushed stone to Annapolis Junction. Its quarries are located on the CSX lines, so that no other form or provider of transportation had to be considered by it.

Laurel Sand & Gravel's quarry is located where crushed stone must be transported over the lines of both MMR and CSX to reach Annapolis Junction. MMR's best price to Laurel Sand & Gravel for the trip from Frederick, Maryland, to Emory Grove in Glyndon is $1.55 per ton. Therefore, Laurel Sand & Gravel could only afford to pay $1.00 to transport the crushed stone from Emory Grove to Annapolis Junction if it wanted to keep its transportation cost competitive with Millville's. A rate of $1.00 per ton for CSX is less than one-half of what CSX computes its actual cost to be, and well under what plaintiffs' own economist computes the cost to be. He set CSX's cost at $1.72 per ton. Even if CSX's cost were as low as that computed by plaintiffs' economist and CSX were to provide transportation service at cost, the total cost to Laurel Sand & Gravel for transportation from Barrick Quarry to Annapolis Junction would be $3.27 per ton, well in excess of the rate availlable to its competitor Millville because of its geographical advantage.

Plaintiffs realized that they could not afford even CSX's best price for its service. Therefore, when CSX initially proposed $2.95 per ton, they were quick to seize the moment and clarify the offer as an "exit" offer, too expensive to accept and tantamount to a rejection. The next day in a short letter they demanded that CSX rent its track to MMR and let MMR provide the service to Laurel Sand & Gravel.

When CSX refused, observing that it preferred to remain in the business of providing rail transportation service and not begin the business of renting track, plaintiffs focused their lawsuit on this refusal alone. Although subsequent negotiations produced a $2.12 per ton rate (which CSX claims is $.01 over its variable cost), from plaintiffs' point of view, these negotiations were only an exercise of form.

Plaintiffs have now structured their lawsuit narrowly so as to be based solely on the refusal of trackage rights, a service CSX has not offered and is not in business to offer. It does not engage in the business of renting track and granting trackage rights to feeder shortline railroads for service to sites on CSX's line. Indeed, there is no evidence that it has ever done so. The only contention to the contrary is an assertion by counsel for the plaintiffs that CSX entered into a *reciprocal* trackage rights agreement with a shortline railroad in the Buffalo area, the business circumstances of which are not of record. It follows, therefore, that the refusal to grant trackage rights would rationally flow from CSX's normal business and would be motivated from its expressed wish not to change course. Moreover, there would appear to be no economic basis to compel such an offer. To do so would be tantamount to transferring profitable business of CSX to its feeder shortline railroads, and systematically dismantling its business.

More importantly, however, there is no evidence, as is required to establish a violation of § 1 of the Sherman

Act in this case, that the refusal of trackage rights was in furtherance of the conspiracy that plaintiffs infer from earlier conduct of CSX. There is no factual or rational reason to believe that agreements to favor Millville as a competitor in the aggregates market motivated CSX's refusal to rent track, a step which would surrender its tools in trade from which it derives its profit.

No doubt if plaintiffs were claiming that unnecessarily high prices for CSX's service were anticompetitive and amounted to a refusal of service, which CSX had given to Millville at a lower price, the issue whether such a refusal was connected with the conspiracy alleged would be a triable one. As pointed out, however, that is not, and cannot be, the claim of plaintiffs. They are not interested in CSX's service; they want access to its tools.

Plaintiffs press their argument on the superficially attractive contention that CSX has engaged in a *series* of exclusionary acts to concert with Millville to deny rail access to Laurel Sand & Gravel and others, and that the refusal of trackage rights is but one in that series. While each other act cited by plaintiffs may have been suggestive of that conspiracy, the denial of trackage rights was not in furtherance of the alleged conspiracy.

As noted, the "exit" offer of $2.95 well could have been to favor Millville and in furtherance of the alleged conspiracy. But the shift in position by plaintiffs from a request for *service* to a request for *track access* was a creative attempt by plaintiffs to circumvent the inevitable unworkability of receiving *service* at any price. The request was an attempt to reduce the players involved from three (Laurel Sand & Gravel, MMR, and CSX) to two (Laurel Sand & Gravel and MMR), with the attendant savings to plaintiffs and consequential losses to CSX. Thus, the response by CSX was not in response to any pre-existing agreement to protect Millville, but rather a response unilaterally made to protect its own business. Nowhere in the record is it shown that there was any

indication that CSX considered Millville's position on trackage rights, and Millville was not aware of either the request or the refusal. Logically, if the pre-existing conspiracy is assumed, CSX would concern itself with Millville's position on setting a rate for service, *e.g.*, at $2.95 per ton. When it came, however, to giving up its track, the issue was no longer Millville or competition in the transportation of aggregates; the issue became the decision of CSX whether to change its long standing method of doing business. All the evidence points to the conclusion that *this* decision was unilaterally made.

When the issue was first raised in November, 1986, whether CSX would rent track to MMR, as opposed to participating with it as a feeder railroad, which is the original reason CSX sold track to MMR, the considerations necessarily focused on what product CSX would offer and whether it should alter, for the first time, its long standing way of doing business. The overwhelming presence of these business considerations makes unilateral action the only plausible alternative.

Section 1 of the Sherman Act prohibits every contract, combination or conspiracy in restraint of trade, which is unreasonable, that is, whose anti-competitive tendencies outweigh legitimate regulation or even pro-competitive effects. The anti-competitive tendency must adversely affect competition in the marketplace and not merely hurt the competitors therein. For if the contract adversely impacts competitors, but is neutral or even promotes competition, the resulting damage is not of the kind that is scrutinized under the antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-A-Mat, Inc.*, 429 U.S. 477, 488 (1977).

A violation of § 1 requires that two or more persons act in concert. Independent action is not proscribed, and a business has a right to deal, or refuse to deal, with whomever it likes. *Monsanto Co. v. Spray-Rite Service*

Corp., 465 U.S. 752 (1984); *U.S. v. Colgate & Company*, 250 U.S. 300 (1919).

When an agreement to restrain trade is *inferred* from other conduct, and the conduct under scrutiny is ambiguous so that by one interpretation it is consistent with the illegal agreement and by another it is consistent with independent conduct or a legitimate business purpose, proof or evidence that tends to exclude the legal course must be presented. *See Monsanto, ibid.*; *Terry's Floor Fashions, Inc. v. Darlington Industries, Inc.*, 763 F.2d 604, 611-12 (4th Cir. 1985). In *Monsanto*, the Supreme Court concluded that complaints made to a distributor about pricing conduct of the complainant's competitor, coupled with termination of that competitor, were not sufficient, standing alone, to prove a conspiracy in violation of § 1. There must be some evidence in addition that shows a common scheme to achieve the unlawful objective. As the Court in *Monsanto* stated:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 768.

When a defendant puts that standard to the test on a motion for summary judgment, then the plaintiff must come forward with the evidence that tends to exclude the possibility of independent conduct. In *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986), the Court stated:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent

> with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Id. at 764. *See* also *Cities Service*, [391 U.S.] at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. at 764.

Id. at 587-88.

In *Matsushita*, the plaintiff offered evidence that the defendants entered into illegal conspiracies which took place in Japan, not as violations of American law, but rather as circumstantial evidence that similar conduct took place among the defendants in the United States. While the Court of Appeals had observed that a reasonable fact finder could infer that an illegal conspiracy took place in the United States, the Supreme Court ruled that the Court of Appeals erred in failing to consider whether it was "plausible" for the defendants to participate in the illegal conspiracy in the United States. As the Supreme Court noted:

> [i]f petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Id. at 596-97.

The structure of proof in the instant case is strikingly similar to that presented in *Matsushita*.

In this case there is concededly a total absence of direct evidence suggesting concerted action between CSX and Millville in the denial of trackage rights. Plaintiffs' argument by necessity rests on evidence of earlier incidents from which plaintiffs wish this Court to infer an overarching conspiracy. However, this evidence fails to

exclude the possibility that CSX's decision to deny trackage rights was a unilateral decision motivated by plausible business reasons. An explanation of CSX's decision to deny MMR trackage rights does not require the assumption of an agreement with Millville. CSX's decision was consistent with its marketing plan. Its relationships with shortlines are created to put to use CSX's rolling stock and overhead which have been established for promoting transportation *service.* The shortlines are intended to be feeder railroads by which the demand for transportation services is fed to CSX. If CSX were to surrender this business to the feeder lines and simply rent track, it would be reduced to a "toll collector," a function which is inconsistent with its business purpose. Not only do the economic realities of the circumstances make it irrational to believe that CSX would alter its business direction in this manner, it is undisputed that CSX has never proceeded in that direction for its business.

In the circumstances of this case where the alleged conspiracy must be inferred from prior conduct, in the absence of evidence which tends to exclude the possibility that CSX's decision to deny trackage rights was unilateral with permissible business motives, the Court will grant CSX's motion for summary judgment.

Laurel Sand & Gravel finds itself in the unfortunate geographical happenstance of owning a quarry at a location that requires use of two different railroads to transport its product to its distribution center in Annapolis Junction. Pursuing the normal methods of transportation, i.e., by truck or by a joint line agreement between the two railroads, Laurel Sand & Gravel is not able to transport its stone as inexpensively as does Millville, which has its quarries better positioned geographically, at least with respect to railroad lines into Annapolis Junction. It is this geographical factor that has caused Laurel Sand & Gravel its difficulties. Nothing precludes

it from developing its marketing strategy in a way that takes into account its geographical predicament, such as developing alternative distribution points at closer locations and using truck transportation. On the contrary, it has taken the location of its quarry and its distribution center as a given and determined that if it is to compete, CSX must alter its business to offer a product unlike any it has offered in the past. It has figured that if CSX rents its track for $.25 per ton, it will be able to compete with Millville even given its awkward geographical predicament. While the effort is creative, the refusal of CSX to comply does not constitute a violation of the antitrust laws.

III.

STANDING

CSX has also moved to dismiss the claims of Laurel Sand & Gravel because it is an indirect purchaser and therefore it is not of the class of persons entitled to sue under § 4 of the Clayton Act.

Were Laurel Sand & Gravel suing to obtain a joint line transportation agreement or for damages because it could not obtain a reasonable rate, it would be a putative customer of both CSX and MMR. MMR would be the provider of transportation from the Barrick Quarry near Frederick to Emory Grove, and CSX would be the provider from Emory Grove to Annapolis Junction. The joint line agreement would make provision for a transfer of the transportation responsibility at Emory Grove and would specify a combined rate. Any antitrust violation arising out of a refusal to enter into that type of arrangement or out of an illegal charge made under that type of arrangement could very well damage Laurel Sand & Gravel in its business and property and give it standing to sue under § 4 of the Clayton Act.

The claim here made, however, is not in connection with a joint line agreement. Rather, Laurel Sand &

Gravel claims that it has been damaged by the refusal of CSX to grant trackage rights. Under this claim, the parties concede that Laurel Sand & Gravel would not be in a position to use trackage rights—it is not in the transportation business. Rather, it would contract with MMR, if trackage rights were to be given, for all transportation for the entire trip from Frederick to Annapolis Junction, as if MMR owned the entire line. The track rights would be granted to MMR and MMR would resell them as part of its overall service of rail transportation of aggregates.

Under the claim as made, Laurel Sand & Gravel is an indirect, as distinguished from a direct, purchaser. MMR would rent track from CSX and then include that cost as well as its own costs and profit in charging Laurel Sand & Gravel a rate.

Section 4 of the Clayton Act does not permit both the direct purchaser and the indirect purchaser to sue for damages to his business or property. To permit both to sue would present the near impossible task of determining how much each person in a chain of distribution has been damaged and how much has been passed on to the next level, with the attendant risks of a duplicate award. It is now established that only those *directly* injured in their business and property may sue. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). As the Court in *Illinois Brick* stated:

> [T]he antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

Id. at 735.

Plaintiffs in this case, who are represented by experienced and qualified antitrust counsel of long standing,

apparently recognized the standing difficulties of Laurel Sand & Gravel when they initially answered interrogatories in this action. Laurel Sand & Gravel stated in its answers:

> LS&G does not intend to claim damages as a result of the refusal of CSXT to grant trackage rights to MMR from Emory Grove, Maryland, to Annapolis Junction, Maryland.

Likewise, MMR stated in answer to its interrogatories that:

> MMR's damages are distinct from LS&G's . . . MMR's damages arise solely from CSXT's denial of trackage "rights" from the Emory Grove to Annapolis Junction. . . .

Laurel Sand & Gravel now urges that it has standing for damages caused by loss of trackage rights; it is purportedly making its claim in reliance on the decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), where the Court stated:

> As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

Id. at 472.

In *Blue Shield*, the Court permitted subscribers of Blue Shield to sue Blue Shield because it reimbursed the subscriber for psychiatric therapy when the therapy was performed by a psychiatrist, but not when it was performed by a psychologist. The Court held that the subscribers had standing to sue since they were direct purchasers from Blue Shield, even though the plan had been

purchased by the employer and the services were provided by the psychologists. There was no risk of duplicate recovery as would be the case when the direct and indirect purchasers are both given the right to claim damages. As the Supreme Court in *Blue Shield* noted:

> The policies identified in *Hawaii* and *Illinois Brick* plainly offer no support for petitioners here. Both cases focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws. But permitting respondent to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from petitioners. McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services.

Id. at 474-75.

In this case, Laurel Sand & Gravel would be suing for its share of the single damage caused by CSX to MMR. The Court would be left with a task of apportioning damage between MMR, the direct purchaser, and Laurel Sand & Gravel, the indirect purchaser, thereby creating the impermissible task of apportioning damages and risking duplicative recovery. *Blue Shield* left standing the doctrine of *Illinois Brick*, which is applicable here.

Thus, Laurel Sand & Gravel is not a person injured in its business or property as defined by § 4 of the Clayton Act. The Court therefore adopts this additional reason in dismissing the claims of Laurel Sand & Gravel against CSX.

IV.

SECTION 2 CLAIM

MMR, the only plaintiff in Count II, alleges that CSX's refusal to grant trackage rights to MMR for purposes of serving Laurel Sand & Gravel at a location on CSX's line constituted an improper exercise of monopoly power in violation of § 2 of the Sherman Act. It urges that the track from Emory Grove to Annapolis Junction is an "essential facility" or a "bottle neck" and that CSX, as a monopolist in control of the facility, cannot refuse access to MMR.

To establish a violation of § 2 of the Sherman Act in the context of the allegations made, MMR must show that CSX had monopoly power in a relevant market and deliberately engaged in exclusionary conduct to maintain, use, or extend that power. *See Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973); *U.S. v. Griffith*, 334 U.S. 100 (1948). An improper use of the monopoly power can be shown by demonstrating that the monopolist had no legitimate business reason for its conduct. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

The refusal of access by a monopolist to an "essential facility" that is controlled by the monopolist may constitute a willful maintenance of monopoly power in violation of § 2. To establish a violation of § 2 under the essential facilities doctrine, the plaintiff must show four elements: (1) control by the monopolist of an essential facility; (2) the inability of the competitor who is seeking access practically or reasonably to duplicate the essential facility; (3) the denial by the monopolist of the use of the essential facility to a competitor; and (4) the feasibility of providing the facility. *See MCI Communications v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

Tailoring these requirements to the circumstances of this case, in order to establish that CSX violated § 2, MMR must show that (1) CSX controlled an essential component of transportation of aggregates from Frederick to Annapolis Junction; (2) plaintiffs had no reasonable alternative to bypass the "bottleneck" controlled by CSX; (3) CSX effectively denied plaintiffs access to this component; and (4) to provide access would be reasonably feasible in the context of CSX's business and the railroad industry.

The essence of the violation is the use by a monopolist of his control over a "bottleneck" or an essential facility to maintain or extend his monopoly into other markets by denying access to the essential facility to a competitor or potential competitor. The Sherman Act does not require a firm with monopoly power to engage in a joint marketing program or otherwise transact business with another firm if the purpose and effect of the action is not to maintain or extend its monopoly. *See Aspen*, 472 U.S. at 600 *et seq.*

In undertaking to establish the first element, that CSX is a monopolist in control of an essential facility, MMR urges that CSX controls the only rail line between Emory Grove and Annapolis Junction and that other methods of transportation are economically impractical. There is no dispute that CSX controls its own line from Emory Grove to Annapolis Junction and that if that line is the relevant market, it is a monopolist. CSX urges that the market is too narrowly defined. It pursued a "rock runner" service for years in order to gain entry into the market for transporting aggregates in the Baltimore-Washington corridor. Aggregates had theretofore been shipped by truck and by barge. When CSX began serving Millville for the first time, it was able to demonstrate that certain efficiencies could overcome other inflexibilities and permit rail service to compete. When viewing the market more broadly as including all transportation of aggregates in

the Baltimore-Washington corridor, CSX notes that it possess less than five percent of the relevant market, and therefore it is not and reasonably could not be expected to become a monopolist.

While the position of CSX is a reasoned one and appears to make more economic sense than the narrow market described by MMR, in the absence of receiving and evaluating the conflicting expert testimony on this point, the Court is not willing to dispose of that issue on summary judgment.

The second element that MMR must establish is that it cannot reasonably duplicate or pursue a reasonable alternative to the essential facility. This element has not been shown to the Court's satisfaction. It is of course unreasonable to suggest that MMR and Laurel Sand & Gravel should lay a duplicate track next to that of CSX. However, plaintiffs fail to address why CSX's offer to provide service over the line from Emory Grove to Annapolis Junction at $2.12 per ton does not provide a reasonable alternative. This rate is $.01 over CSX's variable cost (according to its calculations) and, in any event, is significantly lower than the rate it charges Millville. Although the charge may not be workable in plaintiffs' plans, the service offered is an alternative to trackage rights so long as it is offered on a reasonable basis.

To make a distinction between rail service from Emory Grove to Annapolis Junction and trackage rights for the same segment is conceptually artificial because either form of access provides rail transportation for that segment. Plaintiffs have charged that CSX monopolized a market consisting of *rail transportation* of aggregates to the Baltimore-Washington corridor, not a market defined by trackage rights.

Because the relevant product market alleged is rail transportation of aggregates, the third element that MMR must show, i.e., that access has been refused, also has not been satisfied. The facts are undisputed that

CSX did not refuse its service. In order for plaintiffs to be able to claim that this offer of access at the rates proposed was a refusal, it would have to show that the rates offered were unreasonable and amounted to a denial of access. This plaintiffs have not undertaken to prove because, as discussed earlier in this opinion, any CSX rate for transportation service over $1.00 per ton would be economically infeasible for MMR and Laurel Sand & Gravel.

Any inquiry into the reasonableness of the rate offered by CSX must focus on the rate's reasonableness in the context of competition, rather than from plaintiffs' perspective. CSX is not responsible for the location of Laurel Sand & Gravel's quarry; it need not offer plaintiffs a rate below its costs in order to provide plaintiffs competitive transportation costs to Annapolis Junction. The Court concludes that in the circumstances of this case MMR would be unable to show that the rate offered was so unreasonable as to amount to a denial of access. The $2.12 per ton quotation was $.01 above CSX's variable cost and was well below the rate CSX charged Millville for shipping stone into Annapolis Junction, even though the Millville trips were longer. Furthermore, it is well within the zone of presumptive reasonableness established by Congress in the Staggers Act for rates that result in a revenue—variable cost percentage less than 180%. *See* 49 U.S.C. §§ 10701a(b)(1) and 10709(d)(2). While a question exists as to the propriety of applying that standard to a contract quotation (such as that involved here), it cannot be said that a zone of presumptive reasonableness established by Congress for tariff rates is not a standard to be considered when determining whether a contract quotation was so unreasonable as to amount to a denial of access. Under that standard, and using the variable cost of $1.72 per ton that was computed by plaintiffs' economist, an unreasonable rate would be one that exceeds $3.10 per ton. It is noteworthy that CSX contends that its $2.12 offer was essentially at cost, or

$.40 over the variable cost suggested by plaintifls. Using CSX's computation of its variable cost, any rate under $3.82 per ton would be within the zone of presumptive reasonableness. In either case, plaintiffs cannot show that the rate offered by CSX was so unreasonable as to amount to a denial of access to CSX tracks.

The fourth and final element that MMR must show to establish a violation of § 2 under the essential facilities doctrine is that to provide access to CSX's tracks would be reasonably feasible in the context of CSX's business. When considering this element, only the feasibility of granting trackage rights must be analyzed because access in the form of transportation service has already been offered by CSX.

It has not been disputed that CSX is in the business of providing rail transportation service. The plaintiffs' economist and the plaintiffs in their brief and pretrial order describe the relevant market in terms of "rail transportation of aggregate materials to the Baltimore-Washington market." The business of rail transportation, however, is quite distinguishable from the business of renting track, a business which plaintiffs wish CSX to enter with their request for trackage rights. The record contains ample business justification for CSX's decision not to enter the track renting business and also shows that entering this business would not be reasonably feasible.

Mr. Frederic Yocum, the Vice President of CSX who denied trackage rights to MMR, stated his reaction to MMR's request:

> It is not generally CSXT's practice to, and I know of no situation where, CSXT has granted line haulage trackage rights to a connecting railroad so that the connecting railroad could provide service to a point located on CSXT's line. That is precisely what MMR proposed. Had we acceded to the request, we

> undoubtedly would have received similar requests from the numerous other feeder lines with which we connect throughout our system. If this practice were to become widespread, we would have run the risk of changing, in a very basic way, the manner in which CSXT is operated, with very uncertain and potentially damaging results. CSXT would be diverted from the operating side of the railroad business and be relegated to the status of "toll taker."

Mr. Yocum also pointed to several business reasons why CSX would not take the business course requested, including: labor relations problems arising from displacing employees; safety considerations in having others operating on CSX tracks; congestion and practical interchange problems with having others operate at the same time that CSX operates on the same tracks; and altering normally established relationships with feeder lines. In short, a demand by MMR to have trackage rights, as distinguished from the transportation service offered by CSX, for the purpose of serving a location on CSX's line is simply a demand that CSX forfeit its business to MMR and resign itself to another business, that of collecting track rent, with its attendant problems. Every shortline railroad would be entitled to demand similar treatment.

The Court concludes as a matter of law that it would not be feasible for CSX to provide trackage rights without altering the very basic nature of its permissible business and, indeed, the railroad industry. Thus, the fourth element that MMR is required to establish has not been satisfied.

The record in this case seems to support the overall conclusion that the aggregates market in the Baltimore-Washington corridor is a competitive one in which Laurel Sand & Gravel and Millville both compete. Millville has been able to obtain novel unit-train transportation agreements, based on CSX's normally offered services, that give it a competitive advantage over truck and barge

transportation in some instances. Laurel Sand & Gravel would like to enjoy the same advantage, but because of the location of its quarry, it cannot take advantage of the normally offered services of MMR and CSX. Laurel Sand & Gravel and MMR are disadvantaged solely because of their geographical circumstance, and not because of any improper denial of access by CSX.

The Court thus concludes that the elements necessary to establish a violation of § 2 have not been demonstrated, and therefore the motion for summary judgment on Count II will also be granted.

Accordingly, for the reasons given in this Opinion, it is ORDERED this 26th day of January, 1989, that:

1. The motion of CSX for summary judgment is granted; and

2. The Clerk is directed to mail a copy of this Opinion and Order to all counsel of record.

/s/ Paul V. Niemeyer
PAUL V. NIEMEYER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PN-87-1582

LAUREL SAND & GRAVEL, INC., *et al.*

v.

CSX TRANSPORTATION, INC.

MEMORANDUM AND ORDER

Plaintiffs have filed a motion pursuant to Rule 59(e) for reconsideration of the Court's Opinion and Order giving judgment to the defendant on January 26, 1989. *See Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F.Supp. 1309 (D.Md. 1989). The motion, which is supported by a 43-page memorandum and a 40-page reply, was also accompanied by an appendix of new materials three inches thick. The defendant, in addition to responding to the motion for reconsideration, moved to strike the supplemental materials and moved for sanctions under Rule 11 by reason of accusations of unethical conduct made by plaintiff and by reason of the submission by plaintiffs of new materials and new theories.

Plaintiffs Laurel Sand & Gravel and Maryland Midland Railway contend that the Court made errors in its recitation of facts relating to various transactions described, particularly transactions describing the alleged conspiracy. *See Laurel Sand & Gravel*, 704 F.Supp. at 1312-16. CSX Transportation contends that these recitations are correct and are supported by the record. Although the Court is not prepared to accept the characterizations of these findings as erroneous, the issue of their accuracy, at least in the aspects described by plaintiffs, is not mate-

rial to the Court's ruling. It was clear that the transactions described in that portion of the Court's opinion did not form the basis of plaintiffs' claim. As this Court observed:

> Plaintiffs cited the five transactions that are described above simply as evidence of an underlying conspiracy, of which they argue denial of trackage rights was a part. Plaintiffs do not claim damages for any of these transactions. *If damages had been claimed for these transactions, it is not at all clear that palintiffs' claims would survive CSX's motion to summary judgment* . . . . (Emphasis added.)

Id. at 1316. To the extent there is a dispute, it is concerned with immaterial facts. Accordingly, the Court will reject these grounds as a basis for setting aside the judgment.

The issue that the Court resolved was whether CSX's refusal to grant "trackage rights" was in furtherance of a conspiracy. In that regard, the plaintiffs challenge the Court's conclusion at 704 F. Supp. at 1317 where the Court wrote:

> Plaintiffs realized that they could not afford even CSX's best price for its service. Therefore, when CSX initially proposed $2.95 per ton, they were quick to seize the moment and clarify the offer as an "exit" offer, too expensive to accept and tantamount to a rejection. The next day in a short letter they demanded that CSX rent its track to MMR and let MMR provide the service to Laurel Sand & Gravel.

The finding again is a foundational description which showed the circumstances against which the demand for trackage rights was made. There is no dispute that the parties had been negotiating for transportation services. But those negotiations turned out to be collateral to the demand for trackage rights and the refusal by CSX to

grant trackage them. It was this demand and refusal that constituted the core of plaintiffs' complaint and on which judgment was rendered. The bases of decision are outlined in the discussions at 704 F.Supp. at 1318-20. Plaintiffs' only challenge to these begins at page 29 of their opening brief in support of the motion for reconsideration. The arguments presented there do not alter the Court's judgment with respect to its findings originally made.

The remaining arguments made on the issues—(1) whether CSX Transportation's offer of transportation service at $2.12 was so unreasonable an amount as to amount to a denial, and (2) whether the Court properly applied principles of standing—are disposed of by the Court's original opinion.

For the foregoing reasons, the motion for reconsideration will be denied.

In its motion to strike, CSX Transportation points out that the Court should not consider additional materials in the circumstances of this case. The Court agrees. The motion for summary judgment was filed after all discovery was completed, and all of the materials that are available to counsel now were available then. The briefs were thorough and the factual submissions were voluminous. The Court afforded counsel argument "to exhaustion" lasting an entire court day. The Court is not presented with oversights or newly discovered evidence. Rather, what plaintiffs now attempt is a new approach with additional facts. While this is not the proper role of a Rule 59(e) motion, it appears that resolution of the issues in the light of new facts would lead to no different result. Nevertheless, the Court will not make that finding and will grant the motion to strike.

The Court will also deny the motion for sanctions. It is necessary to observe, however, that the Court has no evidence that counsel for CSX Transportation engaged

in conduct to deliberately mislead the Court, and the references to the record do not support that type of charge. The Court recognizes that the litigation has been vigorously contested by all parties and has received the contentions of counsel in that context.

For the foregoing reasons, it is hereby ORDERED this 17th day of October, 1989, that:

1. The motion of plaintiffs for reconsideration under Rule 59(e) is denied;

2. The motion of defendant to strike the Appendix is granted to the extent that materials are submitted in addition to those submitted originally in opposition to CSX Transportation's original motion for summary judgment;

3. The motion of defendant for sanctions is denied; and

4. The Clerk is directed to mail a copy of this Memorandum and Order to all counsel of record.

/s/ Paul V. Niemeyer
PAUL V. NIEMEYER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1076

LAUREL SAND & GRAVEL, INC.;
MARYLAND MIDLAND RAILWAY, INC.,
Plaintiffs-Appellants

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee

FILED February 27, 1991

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

Appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court along with a motion to place the petition and suggestion under seal. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the motion to place the petition and suggestion under seal is granted however the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Ervin with the concurrence of Judge Russell and Judge Michael.

For the Court,

/s/ John M. Greacen
Clerk

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> (a) [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—
>
> (1) whether such person or the opposing party, or either party's representative, made mo-

tions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * *

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Com-

mission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Section 56(c) of the Federal Rules of Civil Procedure provides:

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Supreme Court, U.S.
FILED
JUN 24 1991
OFFICE OF THE CLERK

(2)

No. 90-1805

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LAUREL SAND & GRAVEL, INC.,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1805

LAUREL SAND & GRAVEL, INC.,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.[1]

PRELIMINARY STATEMENT

In seeking review by this Court of the decision of the United States Court of Appeals for the Fourth Circuit, Petitioner Laurel Sand & Gravel, Inc. ("LSG") claims to have found erroneous statements of law in what actually was no more than the routine application of settled legal principles to the facts, producing a result with which LSG disagrees. This case presents no conflict with other decisions, no significant legal issues, and

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[1] *Laurel Sand & Gravel, Inc., et al v. CSX Transportation, Inc.*, 924 F.2d 539 (4th Cir. 1991).

no other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 10.

COUNTERSTATEMENT OF THE CASE

Procedural Background. In 1987, LSG brought this civil antitrust action in the United States District Court for the District of Maryland. LSG alleged that Respondent CSX Transportation, Inc. ("CSXT"),[2] had conspired with one of its customers, Millville Quarry, Inc., to exclude LSG, a potential CSXT customer, from the aggregate construction materials market in the Baltimore-Washington, D.C. metropolitan area. LSG was joined in its suit against CSXT by the Maryland Midland Railway, Inc. ("MMR"), a short-line railroad that had sought a grant of trackage rights over CSXT's rail lines in order to serve LSG. MMR also sued CSXT under Section 2 of the Sherman Act, alleging that CSXT had "monopolized" rail transportation of aggregate construction materials through its denial of trackage rights.

Despite one and a half years of discovery, LSG and MMR failed to uncover any direct evidence of the alleged CSXT/Millville conspiracy. (Pet. App. 31a). At the close of discovery, CSXT filed a motion for summary judgment setting forth evidence supporting its claim that its conduct was wholly unilateral and legitimate. In opposition, LSG and MMR presented what they claimed was circumstantial evidence of an alleged unlawful agreement between CSXT and Millville. Viewing the evidence in the light of this Court's *Matsushita* and *Monsanto* decisions,[3] the district court found that this circumstantial evidence did not tend to exclude the possibility of inde-

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[2] CSXT's list of affiliated companies pursuant to Rule 29.1 is contained in an Appendix following Respondent's Brief in Opposition.

[3] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

pendent action by CSXT. The court also found that LSG lacked standing under the principles stated in this Court's *Illinois Brick* decision.[4] Accordingly, the district court granted CSXT's motion on January 26, 1989, and subsequently entered an order dismissing the case.

The appeal was argued on October 2, 1990, and the Court of Appeals for the Fourth Circuit rendered its decision affirming the district court on January 30, 1991. On February 27, 1991, the Court of Appeals denied LSG and MMR's petition for rehearing and suggestion for rehearing *en banc*.

LSG alone has brought the petition in this Court.

The Record Before the Court of Appeals. LSG is the largest producer of sand, gravel and crushed stone ("aggregates") in the Baltimore-Washington area. In 1986, LSG sought to add to its market share by purchasing a new stone quarry (the "Barrick" quarry) located in Woodsboro, Maryland. (Pet. App. 17a). Rather than utilize truck transportation (as LSG and most of its competitors historically had done), LSG sought to explore rail transportation as an alternative for shipping aggregate products from Barrick to the Baltimore-Washington area. (Pet. App. 18a-19a).

A competitor, Millville, had pioneered the use of rail transportation in the early 1980s to move crushed stone products to the Baltimore-Washington market. (Pet. App. 20a). Millville's stone quarry was located in Millville, West Virginia, immediately adjacent to the CSXT main line and therefore ideally situated for rail movement. By 1985, Millville had established an effective distribution network for crushed stone dependent upon rail transportation. (Pet. App. 5a, 20a-21a). Millville was the first supplier to deliver aggregates by rail to the Baltimore-Washington market, which to this day remains dominated by truck transportation. (Pet. App. 20a).

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[4] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

LSG's Barrick quarry is situated alongside the tracks of MMR, a short-line railroad whose tracks ultimately connect with those of CSXT at Emory Grove, Maryland. (Pet. App. 17a). Unlike Millville's quarry, the quarry LSG purchased "is located where crushed stone must be transported over the lines of both MMR and CSX to reach Annapolis Junction." (Pet. App. 26a). LSG must, therefore, utilize the tracks of two railroads, instead of one, to transport its stone to LSG's Annapolis Junction property by rail. Alternatively, LSG could move its stone from the Barrick quarry directly by truck. (Pet. App. 32a-33a).

After acquiring its option to purchase the Barrick quarry in 1986, LSG contacted MMR, who in turn contacted CSXT concerning a possible "joint line" rail movement of Barrick stone with MMR. (Pet. App. 18a). Under this proposal, an MMR train would carry LSG's stone over MMR's tracks from the Barrick quarry to CSXT's tracks at Emory Grove. As proposed by MMR, the cars containing the stone would then be uncoupled and hitched to CSXT locomotives, which would then haul the stone over CSXT's tracks to LSG's Annapolis Junction property. The lowest price at which MMR could profitably perform its portion of the joint haul was $1.55 per ton. (Pet. App. 26a). CSXT initially offered to perform its portion of the joint line movement, and to supply the rail cars for the entire movement, for $2.95 per ton. (Pet. App. 18a). LSG rejected the offer on the ground that its transportation costs under the combined MMR-CSXT rate would render it uncompetitive with Millville.

Recognizing that a joint line arrangement would be economically infeasible, MMR on November 7, 1986 requested that CXST grant MMR the direct use of CSXT's tracks ("trackage rights") from the MMR interchange at Emory Grove to LSG's Annapolis Junction property. If CSXT was willing to rent its track to MMR, MMR in

turn proposed to haul LSG's stone in MMR trains the entire distance, over both MMR's and CSXT's tracks, from the Barrick quarry to Annapolis Junction. CSXT declined MMR's trackage rights proposal and stated that it would prefer "to work with [LSG] through revenue adjustment [on joint line rail service] rather than through a trackage right arrangement." (Pet. App. 18a). CSXT made several proposals in this regard in the ensuing months, including a $2.12 per ton rate that CSXT believed was $.01 above its variable costs for its portion of the haul. (Pet. App. 27a). These offers were rejected by LSG, which elected to pursue the instant litigation.

In discovery, LSG's economist estimated CSXT's actual cost to be $1.72 per ton. (Pet. App. 26a). However, LSG conceded that even if CSXT had performed its portion of the haul at this estimate of cost, the combined MMR-CSXT rate of $3.27 per ton would still be "well in excess of the [estimated $2.50 per ton] rate available to its competitor Millville because of its geographic advantage." (Pet. App. 26a). Also recognizing the economic infeasibility of joint line rail service to LSG's quarry, LSG's own damages expert concluded that LSG's alleged injuries depended entirely upon the presumption that, absent the alleged conspiracy, CSXT would have rented its tracks to MMR pursuant to a trackage rights arrangement. (J.A. 61-62).[5] When asked in a deposition if LSG claimed any damages other than those identified in this damage analysis, LSG's counsel stated for the record that LSG claimed no other damages.

As recognized by the Court of Appeals, Millville's lower costs meant that "no joint track agreement would have made LSG competitive with Millville, making trackage rights the only economically viable option." (Pet. App. 6a). The district court thus concluded that "Plaintiffs . . . structured their lawsuit narrowly so as to be based solely on the refusal of trackage rights." (Pet. App. 27a).

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[5] "J.A." refers to evidence contained in the Joint Appendix which was submitted to the Court of Appeals.

CSXT's motion for summary judgment raised two arguments for dismissal of the conspiracy claim. First, CSXT noted that, because the plaintiffs' alleged injuries were based solely on the denial of MMR's trackage rights request, LSG had the burden of showing that CSXT's refusal to rent its track to MMR was the product of an illegal agreement with Millville. Because LSG had failed to uncover any evidence tending to negate the legitimate reasons proffered by CSXT for its decision to offer joint line rail service rather than rent its tracks to another railroad, and because LSG had proffered no evidence linking the trackage rights denial to any other evidence of conspiracy, CSXT argued that the conspiracy claim should be dismissed. The district court agreed, finding that "[LSG] and MMR are disadvantaged solely because of their geographical circumstance, and not because of any improper denial of access by CSX." (Pet. App. 43a).

Second, CSXT pointed out that under MMR's trackage rights proposal, CSXT would rent its track to MMR, and MMR in turn would sell its transportation services to LSG. Consequently, LSG would have been an indirect purchaser of CSXT's track, and thus under the *Illinois Brick* rule, LSG did not possess standing to sue CSXT for CSXT's refusal to rent its tracks to MMR. The district court granted CSXT's motion on this ground as well.

Finally, CSXT asked the district court to dismiss MMR's monopolization claim, in which MMR alleged that CSXT's refusal to grant MMR trackage rights was tantamount to denial of access to an "essential facility." The court granted CSXT's motion, finding that CSXT's reasons for refusing to rent its track were legitimate and its joint line rate proposals constituted an offer of reasonable access to CSXT's rail lines. (Pet. App. 40a-41a).[6]

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[6] MMR is not a party to LSG's petition for a writ of certiorari and has not sought review of the dismissal of its monopolization claim.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD SET FORTH IN MATSUSHITA.

In *Matsushita*, the Court set forth the standard applicable to motions for summary judgment in connection with allegations of antitrust conspiracy:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.* at 764. *See also Cities Service*, [391 U.S.] at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. 764.

475 U.S. at 587-88.

This analysis focuses on the conduct that causes injury, and not on "other conduct involved in the alleged conspiracy [which] cannot have caused such an injury." 475 U.S. at 584 n.7. Accordingly, both the district court and Court of Appeals focused upon the alleged injury-causing activity—the denial of trackage rights—and concluded that this activity, either considered alone or in the context of other alleged conspiratorial conduct, did not satisfy the accepted *Matsushita* standard. Both courts properly and thoroughly reviewed the record for evidence that might tend to exclude the possibility of independent action by CSXT, and both courts found the record lacking in this regard.[7]

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[7] LSG makes the somewhat halfhearted argument that the courts below required LSG to present enough evidence to "actually exclude

1. LSG's primary argument is that by discussing separately each of the transactions LSG had alleged as circumstantial evidence of a conspiracy the Court of Appeals "compartmentalized" the evidence too tightly. LSG infers that because the court examined each allegation separately for any indication of conspiracy, it somehow failed to take these episodes into account when it applied the *Matsushita* standard to the denial of trackage rights, the only incident about which LSG ultimately complains. However, there is nothing in either of the lower courts' decisions to suggest that LSG's alleged evidence of conspiracy with respect to these various transactions was not fully considered. Rather, the courts simply recognized, first, that "CSX has offered a rational business explanation for *each* of the transactions" (Pet. App. 23a) (emphasis added), and second, that LSG's allegations in any event did not tend to exclude the possibility that CSXT's denial of trackage rights was unilateral. Indeed, the opinions reflect a careful review of LSG's allegations, resulting in conclusions by both courts that there was no evidence from which it could be inferred that CSXT's conduct, including its refusal to rent its tracks to MMR, was the product of a conspiracy.

A brief review of the lower courts' findings with respect to the particular transactions relied upon by LSG reflects the straightforward application of the *Matsushita* standard.

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any possibility" of independent action by CSXT, whereas *Monsanto* and *Matsushita* require only enough evidence to "tend to exclude" that possibility. (Pet. 22). Even a cursory review of these opinions, however, leaves no question that the courts considered and applied the correct summary judgment standard. The District Court quoted or stated the words "tends to exclude" no less than five times throughout its opinion. (Pet. App. 30a, 31a, 32a). Likewise, the Court of Appeals explicitly stated the correct standard three times. (Pet. App. 7a, 8a). LSG's implication that the lower courts announced a controversial new summary judgment standard thus is wholly unsupported.

The 1984 Lease Agreement. Both the Court of Appeals and the district court found that CSXT's 1984 lease to Millville of its "wye" tracks at Annapolis Junction was in CSXT's best unilateral interests, inasmuch as Millville was at the time developing its distribution network and actively negotiating for use of CSXT's rail service. By contrast, LSG in 1984 had no plans for rail shipment of aggregates and "did not even own a stone quarry." (Pet. App. 24a).[8]

The Rockville Crushed Stone Rate Negotiations. Both courts below found that CSXT's proposed rate increase to Rockville Crushed Stone (which had nothing whatsoever to do with LSG) was consistent with CSXT's desire to maximize profits and did not reflect a desire to exclude competitors of Millville from the market. Indeed, far from excluding a new competitor, the CSXT/Rockville rate negotiations (during which CSXT subsequently offered Rockville a lower rate) ultimately resulted in the fact that "CSX and Rockville Crushed Stone actually did execute a rail transportation contract." (Pet. App. 24a).

Sale of Fulton Station Property to Millville. As noted by the district court, no inference of conspiracy could be drawn from CSXT's acceptance of Millville's bid for the Fulton Station property since "Millville offered both a higher price for the property and offered to move more stone through the property." (Pet. App. 24a). Again, LSG at no time sought access to this property and indeed had nothing to do with this transaction.

CSXT's "Joint Line" Rate Proposal. LSG contends that CSXT's initial offer to perform its portion of a joint line arrangement at $2.95 per ton was so high that it could

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[8] In any event, the lease did not block LSG's access in any real sense (assuming LSG subsequently purchased a quarry), because "[o]ther points of [LSG's] property are contiguous to the CSX tracks from which a spur track could be built." (Pet. App. 23a-24a).

not have been intended to be accepted. As both courts noted, however, this argument ignores CSXT's subsequent offer of a series of lower rates in an effort to obtain LSG's business, including an essentially at-cost rate that LSG rejected. (Pet. App. 4a, 19a, 27a, 39a). LSG's unsupported allegation thus fails, as the courts concluded, to refute CSXT's evidence that its offers of joint line service were made in good faith and without regard to Millville's interests.

CSXT's Trackage Rights Denial. As both courts determined, LSG introduced no evidence whatsoever suggesting that the trackage rights denial, the only CSXT conduct that LSG alleges caused it injury, was "prompted by conspiracy." (Pet. App. 2a). To the contrary, both courts concluded that CSXT introduced substantial, unrefuted evidence that it declined to pursue a track rental in favor of joint line rail service based on unilateral, legitimate and rational business concerns. (Pet. App. 9a, 32a, 41a, 42a).[9] Indeed, LSG's own expert conceded that CSXT's concerns regarding rental of its tracks were legitimate. (J.A. 698-99).

2. LSG's second contention—that the Court of Appeals "fail[ed] to honor the rule that separate agreements for each act in furtherance of an unlawful agreement need not be proven" (Pet. 19)—fares no better. Nothing in the court's opinion suggests that the court required LSG to prove a separate illegal agreement between CSXT and Millville specifically relating to the trackage rights denial in order to impose liability for that denial. What the Court of Appeals did require was evidence indicating

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[9] Petitioner's suggestion that CSXT should have thought to offer MMR a "run-through" arrangement (Pet. 11) simply is not an issue in this case because Petitioner *never asked CSXT to provide run-through services*, and indeed there is no evidence anywhere in the record that this hypothetical arrangement was ever discussed by anyone, much less considered and rejected by CSXT, much less considered and rejected pursuant to some illegal agreement with Millville.

that the trackage rights denial was "prompted by conspiracy." (Pet. App. 2a).

It is hornbook law that, in order to impose liability for a conspiracy, there must be an "overt act in furtherance of the conspiracy that causes injury to the plantiff." *Bivens Garden Office Building, Inc. v. Barnett Bank of Florida*, 906 F.2d 1546, 1550 n.7 (11th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 1695 (1991). *See also Lawrence A. Sullivan, Handbook of the Law of Antitrust* § 109 at 311-15 (1977) (defining the classic § 1 conspiracy). In holding that the trackage rights denial was *not* "in furtherance of a conspiracy," the Court of Appeals found that the reasons advanced by CSXT for the action it took were entirely legitimate, and that LSG had failed to produce sufficient evidence to tend to exclude those reasons as the true basis for CSXT's action.[10]

LSG claims that the Court of Appeals' conclusion was based solely on erroneous factual findings that CSXT did not consider Millville's position on trackage rights and that Millville was unaware of either the request or the refusal—hardly an issue warranting this Court's attention. (Pet. 13). In fact, however, both courts below not only were correct in these findings, but also quite clearly considered CSXT's affirmative evidence of legitimate business reasons underlying its decision not to rent its tracks. Specifically, the district court discussed in detail the unrebutted affidavit of Frederic Yocum, the CSXT Vice President who denied the trackage rights request. Mr. Yocum explained that granting MMR's request would have meant a radical and unprecedented departure from CSXT's established business practices and

[10] The fact that the Court of Appeals found that the trackage rights denial was not "prompted by conspiracy" also disposes of LSG's remaining objection to the court's application of *Matsushita*. LSG's statement that an otherwise legal action may become illegal if undertaken "pursuant to" an unlawful conspiracy is both true and irrelevant. The point of the Court of Appeals' opinion is that LSG failed to produce any evidence tending to show that the trackage rights denial was linked in any way to any conspiracy.

could create labor relations problems, safety hazards, traffic congestion, and disruption of normal relationships with other feeder railroads. (Pet. App. 42a).

Both courts below recognized that in renting its tracks to another railroad CSXT would "be diverted from the operating side of the railroad business and be relegated to the status of 'toll taker.'" (Pet. App. 12a, 42a). The district court also recognized that "it would not be feasible for CSX to provide trackage rights without altering the very basic nature of its permissible business and, indeed, the railroad industry." (Pet. App. 42a). The court thus concluded that "[t]he record contains ample business justification for CSX[T]'s decision not to enter the track renting business." (Pet. App. 41a). LSG's failure to produce any evidence to refute these facts led both courts to conclude that LSG simply had failed to adduce sufficient evidence linking CSXT's conduct to any alleged illegal conspiracy to withstand summary judgment.

3. LSG's final contention is that the Court of Appeals' application of the *Matsushita* standard conflicts with the Ninth Circuit's application of the standard in *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990) (hereinafter "*Chevron*"), *cert. denied*, —— U.S. ——, 59 U.S.L.W. 3726 (1991).[11]

In *Chevron*, the Ninth Circuit held that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will not be entitled to summary judgment unless, in addition to demonstrating that its conduct is consistent with other plausible explanations, it also shows that "permitting an inference of conspiracy would pose a significant deterrent to beneficial pro-competitive behavior." 906 F.2d at 440. The Ninth Circuit acknowledged that its "deterrent to bene-

[11] Subsequent to the filing of LSG's petition, this Court denied the petition in *Chevron*.

ficial pro-competitive behavior" requirements was not explicitly stated in either *Monsanto* or *Matsushita*, but stated that it found the idea implicit in the Supreme Court precedents.

Petitioner is correct in saying that the Court of Appeals below did not expressly adopt the standard stated by the Ninth Circuit in *Chevron*. In the present case, the Fourth Circuit merely set forth, without embellishment, the standard as stated by this Court in *Monsanto* and *Matsushita*. It then proceeded to apply that standard to the undisputed facts. The case called for nothing more. Whatever the Ninth Circuit's elaboration on *Monsanto* and *Matsushita* means—whether it will develop into a fact-based inquiry, or an abstract form of economic assessment—there is no indication that it would have affected the outcome of this case. For example, it is difficult to see how the Ninth Circuit could apply its rule to require CSXT to offer services at a rate lower than its own cost, to sell its property at something other than the best price it could obtain, or to fundamentally alter the nature of its business through a rental of its tracks.

In sum, the opinion of the Court of Appeals in this case establishes no new or unique summary judgment requirement, and merely adheres closely to the decisions of this Court.

II. THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER DID NOT HAVE STANDING.

1. The Illinois Brick Doctrine. Under the principles established in *Hanover Shoe, Inc v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), an "indirect purchaser" of goods or services is deemed not to have been "injured in [its] business or property" within the meaning of Section 4 of the Clayton Act. This Court consistently has recognized that a contrary rule would undermine the

policies of the antitrust laws by unduly complicating apportionment of damages between direct purchasers and subsequent indirect purchasers, to whom some of the "injury" may or may not be passed. In both of these decisions, the Court came to the judgment that:

> [T]he antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

Illinois Brick, 431 U.S. at 734-35, citing *Hanover Shoe*, 394 U.S. 481. Only last term the Court refused to carve exceptions in this well established doctrine. *Kansas v. Utilicorp United, Inc.*, —— U.S. ——, 110 S. Ct. 2808, 2817 (1990).

Contrary to LSG's contention, this rule limiting antitrust standing to directly injured parties is not confined to cases involving an illegal "overcharge." *See, e.g., McCormack v. National Collegiate Athletic Ass'n.*, 845 F.2d 1338, 1342 (5th Cir. 1988) (indirectly injured university alumni, football players, and cheerleaders lacked standing to sue for alleged antitrust violations which restricted benefits to student athletes); *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (defunct airline's former employees lacked standing to complain of alleged antitrust conspiracy which drove their employer out of business and indirectly caused plaintiffs to lose employment); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 542 (9th Cir. 1987) (crew members of fishing vessels lacked standing to sue for alleged conspiracy among canneries to set artifically low tuna prices, which caused indirect reduction in crew members' wages). The common thread running through these cases is that the plaintiffs' alleged injuries—*regardless* of the nature of those injuries—are indirect, and thus insufficient to confer antitrust standing under *Illinois Brick*.

As the district court correctly determined, it is undisputed that under the terms of the proposed trackage rights arrangement that forms the basis of LSG's damages claim, "[t]he track rights would be granted to MMR and MMR would resell them [to LSG] as part of its overall service of rail transportation of aggregates." (Pet. App. 34a). Because MMR alone was to purchase trackage rights from CSXT, any injury to LSG would first have to flow through MMR. LSG thus would have been an "indirect purchaser" and does not possess standing to sue with regard to this transaction.

2. The Alleged "Focus" of Conspiracy. In a brief argument, LSG contends that the *Illinois Brick* rule should not apply if an indirect purchaser is the " 'focus' of an unlawful conspiracy." (Pet. 26). LSG's reliance on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), in support of this contention is, however, wholly misplaced. Contrary to LSG's indirect purchaser status here, in *McCready* the plaintiff was a *directly* injured party, and was *not* the focus of the alleged conspiracy. In allowing the plaintiff to pursue her claim, the Court thus implicitly reaffirmed the importance of the *Illinois Brick* principle: Since McCready fell within the class protected by Section 4, and was not barred by the *Illinois Brick* rule, there was no reason to dismiss her claim merely because she was not the focus of the conspiracy. That decision thus cannot plausibly be viewed as altering in any way, much less eroding, *Illinois Brick's* indirect purchaser rule.

Moreover, contrary to Petitioner's suggestion, the Court of Appeals correctly applied *McCready* to the facts of this case. The Court of Appeals acknowledged a critical distinction—unmentioned in LSG's petition—between the plaintiff's injuries in McCready and the alleged injuries of LSG in the present case:

> While the subscribers [in McCready] suffered direct and readily discernible economic harm from the

> health plan's refusal to reimburse them for psychological care, *LSG's harm from the refusal of trackage rights is discernible but indirect.* The subscriber lost money spent for a psychologist's care; *LSG only lost potential savings on transportation costs through direct purchaser MMR*, and possible profits from trackage rights. Under the *Hanover Shoe/Illinois Brick* standard, LSG as an indirect purchaser has no standing.

(Pet. App. 10a) (emphasis added).

Petitioner is asking this Court to create an exception to the *Illinois Brick* standard—for indirect purchasers that allegedly are the "focus" of a conspiracy—that has been expressly rejected by every Circuit that has specifically considered it. *See Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 966 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984) ("The issue is not whether Appellees . . . are the direct targets of an alleged conspiracy, but rather whether they are in the class of persons considered to be injured in their business or property under Section 4 by an antitrust violation"). *See also State of Illinois ex rel. Hartigan v. Panhandle Eastern*, 852 F.2d 891, 898 (7th Cir.), *cert. denied*, 488 U.S. 986 (1988) ("We are unwilling to complicate the administration of *Illinois Brick* by trying to distinguish between difficult and easy apportionment cases").

The point of *Illinois Brick* is that a clear antitrust standing rule is essential to efficient and effective private antitrust enforcement. By its nature, it thus cannot permit *ad hoc* exceptions that would embroil the district courts in complex damages apportionment and otherwise undermine the incentives of directly injured parties to bring suit. Recognizing this principle, this Court has declined to permit any erosion of the indirect purchaser rule:

> In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be dis-

> proved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in *Hanover Shoe* and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

Utilicorp United, —— U.S. ——, 110 S. Ct. at 2817.

3. Injunctive Relief. For the first time in the four years since this litigation began, Petitioner makes reference to having included a claim for "injunctive relief" in its initial complaint. Petitioner also contends—again for the first time in this litigation—that the limitations on antitrust standing stated in *Illinois Brick* should not extend to its claim for injunctive relief. Indeed, LSG concedes in its petition that it "did not explicitly raise the § 16 issue below." (Pet. 24 n. 47).[12] It is more accurate to say that this argument was raised neither explicitly nor implicitly, and thus neither of the lower courts was given any opportunity to consider it.

"Where issues are neither raised before nor considered by the Court of Appeals, this Court ordinarily will not consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). *See Miree v. DeKalb County*, 433 U.S. 25, 34 (1977) ("The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.").[13] Because

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[12] Contrary to Petitioner's attempt to explain its silence on the issue, it was not "subsumed" in any question presented to the Court of Appeals. If Petitioner sought to present the claim, it needed only to draw a distinction between its injunctive claims and damages claims for *Illinois Brick* purposes. It did not do so in the lower courts at any time.

[13] *See also EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted where petitioner did not raise issue in Court of Appeals); *Lawn v. United States*, 355 U.S. 339, 363 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.").

LSG elected not to present this issue either to the district court or the Court of Appeals, neither court's opinion addresses the applicability of *Illinois Brick* to claims for injunctive relief. Because the courts below established no precedent on this issue, and because it was LSG's own decision to refrain from raising the matter until now, there are no exceptional circumstances which warrant review of this issue.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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June 24, 1991

APPENDIX

APPENDIX

CSX TRANSPORTATION, INC.'S RULE 29.1 LIST OF INTERESTED PARTIES

All of the common stock of CSX Transportation, Inc. is owned by CSX Corporation. The following companies are affiliated with CSX Transportation, Inc. but are not wholly owned subsidiaries:

Baronial Transportation Corporation ("BTC")
Akron and Barberton Belt Railroad Company, The
Akron Union Passenger Depot Company (The)
Allegheny and Western Railway Company
Wesjax Development Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company, The
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Florida Pipeline Corporation
Central Rail Road Company of South Carolina, The
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chicago and Western Indiana Railroad Company
Clearfield and Mahoning Railway Company
Cleveland Terminal & Valley Railroad Company, The
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Lakefront Dock and Railroad Terminal Company, The
Nicholas, Fayette and Greenbrier Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company ("R-W")
RF&P Corporation ("RF&P")
Terminal Railroad Association of St. Louis
Trailer Train Company
Winston-Salem Southbound Railway Company ("WSSB")

Woodstock & Blocton Railway Company
Energy Dominion
Gemetal Distribution Services Company
Yukon Pacific Corporation ("YP")
James Center Development Company ("JCDC")
Mid Allegheny Corporation ("MAC")

Supreme Court, U.S.
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No. 90-1805

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LAUREL SAND & GRAVEL, INC.,
Petitioner
v.
CSX TRANSPORTATION, INC. and
MARYLAND MIDLAND RAILWAY, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The crux of the decisions below, making them worthy of review by this Court, is their extension of *Monsanto*'s and *Matsushita*'s summary-judgment methodology to undermine well-established substantive principles of antitrust conspiracy law. CSX' Brief in Opposition makes no attempt to reconcile the lower courts' analysis with those principles; indeed, it barely acknowledges them, turning the same blind eye as the courts below to antitrust conspiracy doctrines as venerable as the Sherman Act itself.

The case thus squarely presents the issue of what constraints, if any, those doctrines impose on lower courts seeking to implement the broad principles enunciated in *Monsanto* and *Matsushita*. CSX' protestations notwithstanding, the conflict among the circuits on this issue is

plain. While other courts of appeals—in *Chevron*[1] and the other cases cited in the petition for certiorari (at 17-18 & n.36)—have reaffirmed and continue to respect traditional conspiracy doctrines when considering antitrust summary judgment motions, the Fourth Circuit evidently has deemed them superseded.

The issue is squarely presented here, notwithstanding the supposed "additional reason" (Pet. App. 36a) given by the courts below for dismissing petitioner's claim without trial—lack of "antitrust standing" to bring the action —for the simple reason that the challenge to petitioner's standing is without merit. CSX' Brief in Opposition points to nothing that could justify the lower courts' attempt to force this case into the *Illinois Brick* mold.[2] Indeed, certiorari would be warranted if only to quash the rulings below that *Illinois Brick*'s "indirect purchaser" rule should be extended to non-"overcharge" cases.

I.

Contrary to CSX (Brief in Opp. 2), petitioner LSG did *not* "fail[] to uncover any direct evidence of the alleged CSXT/Millville conspiracy." Nor did the courts below broadly find, as CSX now suggests, that "there was no evidence from which it could be inferred that CSXT's conduct, including its refusal to rent its tracks to MMR, was the product of a conspiracy" (Brief in Opp. 8).

The district court found quite the opposite. It found "showings by the plaintiff of agreements between CSX and Millville Quarry, Inc. that well could be found at

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[1] *In re Coordinated Pretrial Proceedings In Petroleum Prods. Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991). This Court's recent denial of certiorari in *Chevron*, in which the Ninth Circuit took such a different tack than the Fourth Circuit in the instant case, only increases the uncertainty that currently prevails.

[2] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

trial to be illegal restraints of trade" (Pet. App. 16a).[3] The restraint of trade shown by LSG was in essence a conspiracy to exclude competition for Millville, CSX' established customer, by using CSX' market power over the required rail transportation to raise prospective rivals' transportation costs to prohibitive levels.[4] It was only a single act—CSX' refusal to offer LSG economically practicable and efficient rail service in any form, whether trackage rights for MMR, joint line run-through interchange service,[5] or indeed "*any* proposal" (A. 596, em-

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[3] At oral argument on CSX' summary judgment motion, after reviewing the written record, the district court acknowledged that LSG had established "a factual background or history which is a very difficult history to defend" (A. 1007)—a history that, as the court recognized, "relates to his excluding you in a conspiracy with CSX from the aggregate market" (*ibid.*), including "a lot of transactions that don't look good" (A. 968).

[4] *See, e.g.*, Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

[5] Ordinary joint line interchange service involves hauling of loaded cars by one railroad, using its own locomotives, to its point of interchange with the second railroad, where they are picked up by the second railroad's locomotives for hauling to the destination. On the back-haul the process is reversed. "Run-through interchange" joint line service involves interchanging an entire train (such as the "unit train" contemplated by LSG), including not only the loaded cars but also the locomotives themselves, which "run through" the entire haul with only a crew change at the interchange point. *See* A. 211-12, 308.

The economic efficiencies of "run-through interchange" service arise from the fact that only one set of locomotives to which each participating railroad contributes (A. 213-14), rather than a separate and duplicative set provided by each railroad for its own portion of the haul, need be dedicated to the back-and-forth "unit train" service involved. *See* A. 308-10 ("[i]t's a question of using three locomotives or six"). For short hauls of low-value commodities such as in this case (68 miles total over both railroads), "run-through interchange" or comparable service that avoids underutilization of dedicated locomotives is the only economically practicable arrangement (*see* A. 319) (testimony of LSG's expert railroad economist).

phasis added)—that the district court deemed unconnected to a conspiracy by any "direct evidence." And that act came directly on the heels of the series of CSX actions that (according to the court) could well have been found by a trier of fact to be conspiratorial.

Under the substantive principles of antitrust conspiracy law described in the petition for certiorari (Pet. 17-20), a finding that there was an anticompetitive CSX/Millville agreement as described by the district court would have provided ample basis for a trier of fact to conclude (1) that CSX' refusal to provide LSG with any form of economically practicable rail service was likewise a product of the conspiracy, and (2) that the conspiracy therefore directly injured plaintiff.[6] The sole

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[6] It is untruthful for CSX to represent (Brief in Opp. 5) that LSG's damages expert "concluded that LSG's alleged injuries depended entirely upon the presumption . . . [of] a trackage rights arrangement" and "recogniz[ed] the economic infeasibility of joint line rail service to LSG's quarry," and equally so to imply that LSG's counsel ever disclaimed all "other damages" (*ibid.*). The expert report cited by CSX (A. 58, at 61-62) stated only that the author had included a hypothetical "trackage rights" charge in the "transportation cost" component of his lost-profits calculation for LSG because the particular joint line rate of $2.95 offered by CSX was not "economically viable" and the LSG/MMR last-ditch request for "any proposal" (A. 596) had specifically mentioned trackage rights. *See* A. 61. Not one word in the cited damages report addressed either the necessity of trackage rights or the "economic feasibility" of joint line service in any form, much less under a "run-through interchange" arrangement.

In point of fact, the *only* evidence on that score was the unrebutted testimony of LSG's expert in railroad economics (Dr. Richard Levin of Yale) that joint line service for LSG using a run-through interchange would have been feasible, not subject to legitimate CSX objection, and offered by any railroad that wanted to move the traffic (A. 308-09, 321). Tellingly, even now CSX makes no effort to deny this, responding only that LSG did not ask for the appropriate form of service with sufficient specificity (Brief in Opp. 10 n.9).

As for LSG counsel's alleged disclaimer of non-trackage rights damages, for which CSX provides no citation, we presume CSX

contrary evidence presented by CSX to the summary-judgment court was the conclusory post-deposition affidavit of Yocum, the CSX functionary alleged by CSX to have been the decision-maker.[7] CSX points to nothing in the opinion of either the district court or the court of appeals gainsaying their patent failure, apparently in the belief that *Monsanto* and *Matsushita* forbade it, to consider " 'the whole picture' " (*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)), "looking at it as a whole" (*United States v. Patten*, 226 U.S. 525, 544 (1913)) in determining whether that one conclusory affidavit was enough to foreclose LSG under Fed. R. Civ. P. 56 from even going to trial.

II.

CSX defends the *Illinois Brick* rulings of the courts below by pointing to three court of appeals decisions not involving alleged "indirect purchasers" that establish, it

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refers to counsel's representation that at trial LSG would claim only the lost profits on sales it was unable to make by reason of its conspiratorial exclusion from the aggregates market as calculated in the above-cited expert damages report (plus, assuming its ultimate entry as a result of this litigation, the additional start-up costs resulting from the conspiratorially-caused delay). Matovcik Dep. Tr. 451-52 (not reproduced in the Joint Appendix below). All that was "disclaimed" was still another but as-yet-uncalculated component of damages, representing the increased costs of constructing physical access to CSX' main line necessitated by CSX' grant to Millville of exclusive access via the existing "wye" track. This is a far cry from a disclaimer of all non-trackage rights damages, as CSX would have it.

[7] While CSX characterizes Yocum's affidavit as "unrebutted" (Brief in Opp. 11), LSG presented extensive evidence of meetings and memoranda surrounding his decision that threw his conclusory denials into sharp question (*see* Pet. 10 & n.25). Moreover, as noted above, the affidavit was filed only *after* Yocum's deposition had been taken. He was never exposed to cross-examination on its consistency with the evidence presented by LSG, much less to an evaluation of his credibility by the trier of fact.

says, that the "rule limiting antitrust standing to directly injured parties is not confined to cases involving an illegal 'overcharge' " (Brief in Opp. 14). True enough as a general principle,[8] but the sole basis for the rulings below was the particularized manifestation of that principle in *Illinois Brick* denying antitrust standing virtually *per se* to indirect purchasers of price-fixed goods. As noted in the petition for certiorari (at 25), this Court has strictly confined its *Illinois Brick* holding to indirect purchasers suing to recover an overcharge.

Applying the general principle on its own terms, without regard to its *per se* applicability to indirect purchasers in overcharge cases, petitioner LSG, as the focus of the CSX/Millville conspiracy, plainly had antitrust standing. The only proper question, as CSX surprisingly seems to agree (Brief in Opp. 16), is whether LSG was "injured in [its] business or property by reason of" the CSX/Millville conspiracy within the meaning of Section 4 of the Clayton Act (15 U.S.C. § 15). The injury inflicted by that conspiracy on LSG—the conspiracy's intended victim—could not have been more direct.[9] Under Section 4 as authoritatively construed in *Blue Shield of Virginia* and *Associated General Contractors*,[10] LSG's

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[8] We note also that, contrary to CSX, the football-player plaintiffs in *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988) were *not* held to lack antitrust standing (845 F.2d at 1343); the court expressly declined to decide the "standing" issue, proceeding instead to decide (and dismiss) the players' claims on the merits.

[9] LSG, a prospective shipper, requested and was denied economically practicable and efficient transportation service by CSX, a connecting line-haul carrier. The court of appeals' attempt to distinguish this injury by labeling it "indirect," invoked by CSX as "critical" (Brief in Opp. 15-16), is not a distinction but a mere conclusion.

[10] *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

antitrust standing to complain of its exclusion from the aggregates market was unquestionable.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] As CSX observes (Brief in Opp. 15), *Blue Shield of Virginia* establishes that being the "focus" of a conspiracy is not essential to antitrust standing, but this does not mean that being the focus is irrelevant.